United States Court of Appeals

for the Second Circuit

APPENDIX

No. 75-7332

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United States Court of Appeals

FOR THE SECOND CIRCUIT

Docket No. 75-7332

CARLYLE MICHELMAN, TRUSTEE OF TEXTURA, LTD., IN BANKRUPTCY PROCEEDINGS, *Plaintiff-Appellee,*

v.

CLARK-SCHWEBEL FIBER GLASS CORPORATION, *and* BURLINGTON INDUSTRIES, INC., *Defendants-Appellants.*

UNITED STATES COURT OF APPEALS
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JOINT APPENDIX

Volume II

(Excerpts from Transcript of Proceedings: Pages 601-1284)

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JCINT APPENDIX

Volume II

In November of 1955 I sold that company to J. P. Stevens & Company, and tnat company became the industrial fiber glass fabrics department of J. P. Stevens. I remained with Stevens for five years as sales manager of their industrial glass fabrics department, and in July, 1960, left Stevens to join with Ray Clark in organizing Clark-Schwebel Fiber Glass Corporation.

I originally was executive vice-president of that company, and on Mr. Clark's passing in 1964 I became president and retained that position today.

Q J. P. Schwebel & Company, I understand, was a manufacturer of fiber glass?

A Yes, we had fiber glass fabrics contract woven in a plant in New Jersey.

Q Is there a distinction, was there at that time between what is known as industrial and fabric fiber glass fabrics?

A Yes.

Q Were you involved in both areas at that point of time?

A No, I was involved only in industrial at that time.

Q So J. P. Schwebel & Company was involved only in industrial fabrics?

A Correct.

Q When was J. P. Schwebel & Company founded?

A In 1952.

Q Solely by yourself?

A Yes.

Q You then were its principal officer and operating individual?

A Correct.

Q In 1955, I believe you testified, J. P. Stevens & Company acquired your company, J. P. Schwebel & Company?

A Yes.

Q And this became the industrial fiber glass division of J. P. Stevens?

A We called it department.

Q From that point of time while you were associated with Stevens did you have any responsibility or any involvement other than in the industrial area?

A None whatsoever.

Q No contact at all whatever with decorative fabrics?

A None from a business viewpoint.

Q What other viewpoint is there?

A Contact? I knew the people who were in the decorative department, but I had no responsibility or

activity in it.

Q But you had contact with the heads of the decorative department?

A No, not directly, other than socially.

Q Just on a social basis?

A Correct. We reported to the same higher executives of the company.

Q Can you identify Mr. Raymond Clark for us?

A When I got to know Ray Clark he was executive vice-president of a privately held company called Hess-Goldsmith. That was in the late 1940's, and subsequently, as I have stated, in 1960 he and I joined together to form Clark-Schwebel Fiber Glass Company.

Q Had you had discussions with Mr. Clark prior to 1960 about the formation of your own company?

A Yes.

Q What reasons were behind your decisions with Mr. Clark to form your own company?

A Well, there were several. We felt that the fiber glass industry, which had essentially begun and had its inception in the postwar years had reached the stage where a firm that would be wholly devoted to the fiber glass business as compared to the firms that were in the business in large measure at that time who were primarily

large diversified textile companies making a complete range of textile products, that such a company highly specialized in the fiber glass business would have a distinct marketing advantage, that if we were to build a plant which was designed, equipped, and engineer specifically and solely for fiberglass, which had never been done before, that we would have a manufacturing advantage.

And, lastly, of course, we felt there was greater opportunities from the standpoint of our own future financial careers in owning and operating our own business than being employees of Burlington and Stevens, as we were at that time.

Q Because Burlington and Stevens being quite large corporations --

A Not because they were quite large corporations, but because I think there is a natural assumption that the potential of any financial success is greater in an independently owned company, or a company in which you have significant equity than you are likely to have in any company, small or large, as an employee.

Q So, in essence, you and Mr. Clark staked out on your own?

A Precisely.

Q Can I assume, then, from your testimony that the defendant Clark-Schwebel is a solely-owned or wholly-owned

pretty evenly distributed, a third each?

A Whose purchases, sir?

Q Let's confine ourselves to your only area of expertise, while you were with Stevens and while you were at Clark-Schwebel.

A While I was at Stevens I was sales manager of the industrial fiber glass department, but I had very little contact or authority over purchasing, so I would hesitate to tell you what the ratio of purchases were because it would be speculative.

Q I don't want you to guess. If you know, you can tell us. If not, you don't know.

A Not while I was at Stevens I don't know.

Q While you were at Clark-Schwebel. While you were at Clark-Schwebel. Excuse me.

A During the period then from inception of our company from 1961 --

Q To 1966.

A We founded the company in 1960 but were not into manufacturing, from 1961 to 1966, during those five years, our purchases were fairly evenly divided on a dollar volume basis between Owens-Corning and PPG, with a possibility of a little bit larger share in dollars to Owens-Corning because they make a line of

fibers.

Q That would encompass both decorative and industrial?

A It was on a fiber basis, rather than a marketing basis and it encompassed rayon, nylon, acetate, viscose, things of that order.

Q Did the synthetic division of J. P. Stevens encompass decorative fiber glass fabrics?

A Yes.

Q Did it encompass industrial fiber glass fabrics?

A Yes, sir.

Q You already testified as to your relationship with Mr. Nordheim. Was it your testimony Mr. Nordheim was principally involved in the decorative area?

A Solely.

Q During your period of time at J. P. Stevens, from 1955 to 1960, aside from Mr. Hackett, who were your other immediate superiors, if any?

A Mr. Sokol, who was also a vice-president, but was head of the synthetic division, and, of course, indirectly the higher officers of the company. But I had relatively little contact with them.

Q For the period 1956 through 1960 did you have occasion -- this is while you were with J. P. Stevens --

to meet with a representative of your competitor companies, that being representatives of Burlington Industries or anyone else, United Merchants, Exeter, any of these companies you have testified to?

A Yes, sir.

Q On what occasions would you meet these people? Would they be on social occasions?

A No, I would characterize them more as business occasions.

Q Would they be at trade association meetings?

MR. TOPKIS: Excuse me, your Honor, is there any reason for this playing around? We all know, we announced it in our opening statements, that there was price fixing engaged in by these companies and we conceded that publicly. We have conceded it repeatedly. I don't see any reason to waste time on it.

THE COURT: That was with respect to industrial?

MR. TOPKIS: To industrial, exactly.

THE WITNESS: Only. I aded the word "only."

Q Your testimony would be in response to questions from me at this time, Mr. Schwebel, not to Mr. Topkis.

THE COURT: Let's not take up unnecessary time. Go ahead.

Q For this period 1956 to 1960 with the help of your

counsel's statement you did occasionally meet with these representatives to discuss price fixing? Is that correct?

A Yes, sir.

Q When was the first meeting or discussion or conference that you had with a representative of competitors with respect to price fixing?

A Some time in 1956. I cannot tell you the dates.

Q Where would that have occurred?

A I don't recall.

Q How did that occur?

A Well, it was a luncheon that Ray Clark, Eric Weiss and I had. I don't recall who initiated the luncheon, but, nevertheless, the three of us were there.

Q Eric Weiss, Ray Clark and yourself?

A Yes.

Q Eric Weiss being from --

A United Merchants.

Q You don't recall who initiated it?

A No, I don't.

Q Where did this luncheon meeting occur?

A I don't remember.

Q Tell us everything that was discussed at that

time, Mr. Schwebel?

A Well, sir, to tell you everything that transpired in a luncheon conversation 18 years ago would be thoroughly impossible.

Q Limit the question to everything that was discussed at that luncheon meeting about fiber glass fabrics price fixing?

A There was nothing discussed about fiber glass fabrics price fixing at that that meeting.

Q There was nothing about price fixing at all discussed at that meeting?

A This was, I would say, a preface to what eventually came to that.

Q Was this meeting for the purpose of setting up another meeting, Mr. Schwebel?

A The purpose of the meeting, if the Court will allow an extended answer, because I cannot give it to you in two words, was simply that until 1956 when Burlington acquired Hess-Goldsmith and Stevens acquired my small company, the only company of any size in the industrial fiber glass fabrics business was United Merchants. The competition in the industry was predatory, to say the least, so severe that it was impossible for small companies to sustain life. United Merchants, of course, being a

larger company, could sustain perhaps their loss for a more extended period of time than the independent companies, and I can say that a prime motivation that caused me to sell my company to J. P. Stevens, which really wasn't my preference or desire, and I believe the primary reason that caused the Goldsmith family to sell to Burlington, was the extremely unprofitable price situation in the business at that time.

Therefore, the thrust of the meeting with Mr. Weiss at that time was simply to communicate to him that now that Burlington and Stevens through acquisition were in this business and had equal financial strength with United Merchants, that perhaps the time had come to do something to avoid the destructive marketing practices that had existed in the business and we simply wanted to get a reaction from Weiss at that point as to whether he viewed the context of the business as being different and significantly changed by virtue of the fact that Stevens and Burlington had entered the business.

And to the best of my recollection, Clark and I came away -- at least I did -- with the impression that this was something that Weiss was going to consider very seriously, and there was no further discussion, and there certainly was no discussiong relating to specific price

fixing at that point.

Q Is it accurate to state that you and Mr. Clark were sounding Mr. Weiss out about a possible arrangement or understanding among the three of you?

A In the broader sense we wanted to find out was there some basis to restore some reasonable stability to the industry. I don't think we knew or conceived of how to accomplish it at that point. It later evolved, of course, as you well know.

Q Mr. Weiss indicated that he saw no objection to this?

A Well, there were no specific proposals that I recall put forth to him to object to. We were merely having a lunchon to reassess what does the industry look like, where is it heading, how does the entry of companies with significantly greater financial backing affect the very unhappy situation that everybody had, including Weiss, who was very displeased and was under, I gather, considerable pressure from the management of his company because of the unprofitability of the fiber glass department of United Merchants.

Q Everyone was pretty much displeased with the situation in the fiber glass industry?

A Yes.

Q Was this limited to industrial?

A Yes.

Q Were any of these motivating reasons that you testified to for getting together to fix prices also present as to decorative fabrics?

A I don't know. I had nothing to do with decorative fabrics in my entire career and I had no way of knowing whether decorative fabrics were more profitable or less profitable and I had no interest, and Clark and I never discussed decorative fabrics, Weiss and I never discussed decorative fabrics.

I was not given any information on it. They well recognized that it would be totally fruitless to discuss decorative fabrics with Jack Schwebel, who had nothing to do with it at J. P. Stevens.

Q Your testimony is that you never discussed decorative fabrics with Mr. Clark is confined to this luncheon meeting?

A. No, until the period after we went into business and determined that we would then go into decorative fabrics, I said, I knew little about it.

Q What did Mr. Clark know about decorative fabrics?

A Well, in the earlier years he had been with Hess-Goldsmith and Burlington.

Q So he did have some involvement in decorative fabrics prior t1960?

A To the extent that somebody who was in charge of that division reported to him as an executive vice-president of the company.

Q And Mr. Weiss, I think you already testified, had some involvement, his company was also involved in both decorative and industrial fabrics?

A Well, I cannot be certain of the time period.

Q Previously you testified -

A In other words, we were talking about this a little bit in the context of 1965 luncheon.

Q That was the first year of our time period.

A I cannot testify as to whether United Merchants was or wasn't in the decorative business in 1965. I just don't know.

Q But you do know that for the significant portion of that time you indicated that they were?

A No, sir, I am not sure. I mean I know that United Merchants was in the decorative business when my company, Clark-Schwebel, in 1961 entered that business, and we were assessing who were the competitors. Prior to that time I couldn't in 1974 -- perhaps I did know the answer yes or no at that time, but as of today I have no recollection of my knowledge of it.

Q In or about 1965, surrounding the time you had this luncheon meeting, whenever that was, did you have any discussions at all with anyone concerning the decorative area and motivating reasons why decorative fabric prices should be fixed?

A None whatsoever.

Q At Stevens during this period of time when you went to this meeting, who was in charge of decorative

fabrics?

A John Wilson.

Q Who were his subordinates?

A I don't know. I had very little involvement with that company. If you can give me some names perhaps it would refresh my recollection.

Q If I could give you names I wouldn't have to ask you, Mr. Schwebel. Do you know?

A I don't know, sir.

Q If my recollection of your testimony is accurate, you attended this luncheon meeting while you were an employee of J. P. Stevens; is that correct?

A Yes.

Q And Mr. Clark was an employee of Burlington?

A Yes.

Q And Mr. Weiss was an employee of United Merchants?

A Yes.

Q Subsequent to that meeting, what was the next time you had a meeting, conversation, conference, with someone who was a competitor regarding price fixing?

A What was the next time?

Q Yes.

A I'm sorry, I couldn't tell you. I remember,

because you tend to remember the opening of a situation, there were meetings, as is public knowledge, during that five-year period, but it would be an impossibility for me to catalog them for you by one, two,three, four, over a period of five years.

Q How many, approximately, were there all told?

A I would guess two dozen.

Q Who were the principal --

A And that's the wildest guess of something that transpired fifteen to twenty years ago.

Q Your memory is really not quite accurate enough to give us the details, is it, Mr. Schwebel?

A The details of how many meetings were held in that five-year period?

Q And who was there?

A I kept no record; I don't remember.

Q Doyou recall who attended these meetings?

A Representatives of the various weavers of the industrial fiber glass fabrics.

Q Who were they?

A Well,there was -- by company now, or by individual?

Q Individual and company.

A I usually attended on behalf of J. P. Stevens;

Ray Clark usually attended on behalf of Burlington; Weiss for United Merchants.

Later on, in other words sometime past the initial meeting that I have described, Bob Spoerl of Exeter.

For the moment, sir, I can't recall any additional.

Q Mr. Gusman?

A If I were available Mr. Gusman didn't attend.

Q So you both wouldn't go?

A No.

Q If you weren't available, Mr. Gusman would go in your stead?

A I think that may have happened on rare occasion, but I couldn't identify particular meetings.

Q It happened on at least one occasion, thought, didn't it?

A I believe so.

Q Were there any other employees of J. P. Stevens in this period of 1955 through 1960 that attended these meetings?

A These meetings?

Q Mr. Schwebel, the meetings, these two dozen meetings, approximately the two dozen meetings you referred to?

A No. Nobody else from J. P. Stevens attended those specific meetings.

Q Do you know a man named Charles Travis?

A Yes, sir.

Q Who is Mr. Travis?

A When Ray Clark resigned from Burlingtonto join in forming Clark-Schwebel, Travis was appointed substantially -- I don't think with the same title, but appointed to succeed Clark in charge of sales of industrial glass fabrics at Burlington.

Q Have you ever met Mr. Travis?

A Yes, sir.

Q Do you recall when you first met Mr. Travis?

A I met Mr. Travis the first time when I was associated with J. P. Stevens, and he was not in the fiber glass business; he was with Burlington in their synthetics division manufacturing industrial fabrics of yarns like rayon, nylon, polyester, etc., for industrial applications.

Q Did Mr. Travis attend any of your price fixing meetings?

A After 1960, after Clark left Burlington, he sort of assumed the role.

Q After 1960, who attended on behalf of Clark-

Schwebel, you or Mr. Clark?

A Either of us.

Q Either one?

A Yes.

Q And at this time you had become familiar with the decorative area, isn't that true?

A No.

Q You hadn't?

A No, we didn't go into the decorative business until the beginning -- the end of 1961 or the beginning of 1962 -- and these meetings pretty much were petering out at that point.

Q At which point?

A '61 - '62. You know, early in '62. When you say go into the business, to the best of my recollection, sir, we hired Mr. Nordheim in around December or January -- December 1961 or January 1962. Now, it took time, obviously, to organize a decorative division. It took Nordhim time, it took the plant time to understand what he wanted to produce, to produce trial quantities, etc. So it wasn't until sometime in 1962 that we became even a minor factor in the decorative fabric business, and I made no attempt to try to become an expert overnight in the thing. We had hired what we understood to be one of the

most highly experienced and capable people in that business, and he had the responsibility for it. I wouldn't claim to be expert today in the decorative business, and thirteen years have transpired.

Q Mr. Schwebel, you have been able to pinpoint a luncheon meeting in 1956 with Mr. Weiss and Mr. Clark. Is it your testimony that you cannot recall when the next meeting was?

A That's correct, sir.

Q Did you have any conversation on the telephone with anyone concerning maintaining or stabilizing prices of fiber glass fabrics?

A I have no recollection of a specific telephone call.

Q Any telephone call subsequent to this luncheon meeting?

A To arrange the second meeting or on the subject of -- or eventual price -- or eventual telephone conversations?

Q Either one, Mr. Schwebel.

A There were telephone conversations relating to pricing of industrial glass fabrics during the period of 1956 to 1960, yes.

Q With whom? Between whom?

A Between the same people who attended the meetings.

Q Did you participate in these telephone conversations?

A On occasion.

Q Who did you speak with?

A Sometimes I spoke with Ray Clark; sometimes I spoke with Eric Weiss; sometimes I spoke with Bob Spoerl.

Q Anyone else did you speak with?

A I can't recall anyone else, no.

THE COURT: We will adjourn now until two o'clock.

(Adjourned to 2:00 p.m.)

AFTERNOON SESSION

(2.00 p.m.)

(Jury in box.)

J A C K P. S C H W E B E L , resumed.

DIRECT EXAMINATION (Continued)

BY MR. ATLAS:

Q Do you know a man named Roland Rowley?

A Yes, sir.

Q Who is Mr. Rowley?

A He is in charge of our industrial fiber glass in the Midwest, working out of Marion, Ohio.

Q Is that presently?

A Yes.

Q From the period 1955 or 1956 to 1966 do you know where Mr. Roweley was located?

A Yes, sir, from 1956 through some time in 1960 he was a salesman for Burlington, and then soon after we formed Clark-Schwebel he joined Clark-Schwebel in the same capacity.

Q After the formation of Clark-Schwebel was he involved at all in decorative fiber glass fabrics?

A No, not at all.

Q Did you ever have any discussions with Mr. Rowley concerning an agreement to stabilize or maintain

the prices of fiber glass fabrics?

A I don't recall any specific conversation of that nature, Mr. Atlas, but I think that Mr. Rowley was aware of the situation prevailing in the industry at the time.

Q How do you know that he was aware?

A Well, I recall that at the time the matter came to the -- a prior matter relating to Owens-Corning actually came before a grand jury in Cleveland, Rowley was called to the grand jury to testify, although I believe in the end they never did ask him to actually testify, and I just have this general recollection that he knew what the subject was about at the time.

Q Are you finished?

A Yes, sir.

Q That was in connection with the fixing of prices of fiber glass fabrics?

A Amont other things.

Q What were the other things?

A Oh, I think that the actual investigation in its origin commenced in order for the Government to determine whether Owens-Corning was living up to the terms of a consent decree that it had signed with the Justice Department many years before and was really was unrelated to the weaving business.

Q Is that the extent of your recollection of discussions had with Mr. Rowley in connection with price fixing?

A Yes, sir.

Q Do you know a man named Joseph Ott?

A I know his name, but I'm not sure that I ever personally met him.

Q Is he involved In the fiber glass industry?

A He was, at least during part of the time period you are referring to.

Q Which time period was that?

A Well, in other words, he was in business in the industrial glass fabric weaving business in a small way subsequent to 1956, but I'm not certain as to whether he was still in that business in 1966.

Q Was he involved at all in the decorative side of the fiber glass industry?

A To the best of my knowledge, no.

Q What exactly did Mr. Ott or his company do?

A They wove a limited range of industrial fiber glass fabrics which they sold in competition with Burlington, Stevens, United Merchants, others, in a plant some place in New England.

Q You have previously identifief for us, Mr.

Gusman, as your assistant at J. P. Stevens and as your successor after you formed Clark-Schwebel?

A My successor at Stevens, correct.

Q Did you have occasion subsequent to 1956 to discuss the question of price fixing of fiber glass fabrics with Mr. Gusman?

A Of industrial fiberglass fabrics, yes, sir.

Q When was the first time you had a discussion with Mr. Gusman?

A I cannot recollect this precise first conversation.

Q Did you often have conversations with Mr. Gusman concerning that subject?

A Yes.

Q Was Mr. Gusman, as far as you were concerned, intimately involved with what you were doing at that time?

A Yes, sir.

Q Did you ever authorize Mr. Gusman to attend meetings with competitors in place of yourself?

A Yes, I did.

Q Did he ever attend any meetings without having checked with you first?

A Not that I know of.

Q After having attended a meeting with competitors

to discuss prices would he report back to you?

A Yes, sir.

Q Would he put those reports in writing?

A I don't recall any written reports.

Q You don't recall ever having seen any written reports?

A No.

Q Do you recall what he told you about any meetings that you had not attended?

MR. TOPKIS: What difference does this all make?

THE COURT: I hope we are not going to spend all this time on industrial fiber glass.

GO ahead.

THE WITNESS: Would you repeat the question?

(Question read.)

A No, I am sorry, I don't.

Q No recollection?

After the formation of Clark-Schwebel did Mr. Clark attend any meetings that you did not attend?

THE COURT: To your knowledge.

A I don't remember any specifically, Mr. Atlas.

Q You don't remember any that he attended without you being there?

A That is correct, I don't.

Q Did you or Mr. Clark ever authorize Mr. Duff to attend such meetings?

A No, sir.

Q Never did?

A Not to the best of my recollection.

Q You testified earlier about a luncheon meeting between Mr. Weiss, I believe it was, and Mr. Clark. Was that at the St. Moritz Hotel?

A You're referring to what I described this morning as the first meeting?

Q You described a luncheon meeting?

A I said then, I must repeat, I just don't remember where that meeting took place.

Q Do you remember having attended a meeting at the St. Moritz?

A Yes.

Q What was the subject of that meeting?

A The same subject that we were discussing with Mr. Weiss and Mr. Clark or a number of occasions over a period of a number of years, pricing of industrial fiber glass fabrics.

Q Do you recall who was present at that meeting?

A Well, you asked do I recall having lunch with

these other two gentlemen at the St. Moritz.

Q If that was your understanding I don't want it to be.

You testified to a lunchon meeting with Mr. Clark and Mr. Weiss?

A The first meeting in 1956.

Q That is the first meeting you recall?

A Yes, sir.

Q I am asking you now, at the meeting that was held at the St. Moritz who was present?

A I recall having a lunchon, not the first luncheon that I described this morning in 1956, but some time between 1956 and 1960 with Mr. Clark and Mr. Weiss at the St. Moritz.

Q The same two people?

A The same two people, yes, sir.

Q What was resolved at that meeting?

A I have no idea at this stage 15 years later.

Q You did eventually agree upon a method of fixing prices?

A Yes, sir.

Q How was that to be accomplished?

A Well, it was accomplished in that we reached a general understanding that if one of the weavers would issue a published price list on the range of industrial

fiber glass fabrics that the other mills within a reasonable time period thereafter would also issue a price list which would be generally competitive in price level to the one initially issued.

Q Was any particular mill supposed to assume the lead in establishing a price?

A Oh, I think on one occasion or more Burlington did so; perhaps on another occasion Stevens; et cetera. I don't think there was any standard procedure which assigned that responsibility to one mill time after time.

Q And these agreed-upon price lists would then be distributed among the competitors?

A Well, in actuality you were mailing out thousands of copies to industrial fabric users all over the country, so it took no effort for any mill to find out what any other mill was publishing as its prices.

Q But Burlington and Stevens would receive copies of Clark's price lists and vice versa?

A Are we talking about the period Clark-Schwebel was in business? The meetings I am describing were when I was working for stevens.

Q Assuming that it was Burlington that initiated the price list, would that list then be forwarded to Stevens?

A Well, we certainly received copies. Whether we received it directly from Burlington I cannot recollect, but it was immaterial.

Q You got the copy of the price list?

A So many thousands were distributed that it was a very simple procedure.

Q In connection with this treatment, this understanding that you had, what efforts did you undertake, if any, to police this agreement, to check that everone was complying with it?

A Well, the only time the question would arise as to whether there was adherence to it waws if a customer in his natural attempt to get a lower price from a supplier than he is initially being quoted would make the claim, as many customers are prone to do, that he can buy it more cheaply elsewhere, and if we seriously believed that he was telling a story that seemed reasonable, we would endeavor to check the veracity of his statement.

Q With your competitors?

A Yes, sir.

Q Mr. Hackett and Mr. Sokol were your superiors at Stevens and were advised of these price fixing activities?

A They were generally aware of them.

Q Were they told by you?

A Yes.

Q Do you recall a meeting at the Berkshire Hotel with respect to this price fixing agreement?

A Yes, sir.

Q Who was present at that meeting?

A Clark, Weiss, Gusman, Spoerl.

Q Do you know when that meeting was to the best of your recollection?

A Well, it was some time subsequent to, I would say between -- either in 1961 or 1962.

Q This was after the formation of Clark-Schwebel?

A Yes, sir.

Q Is it accurate to state that this price fixing agreement continued beyond the formation of Clark-Schwebel?

A Very modestly thereafter.

Q It did continue thereafter?

A Yes, sir. It collapsed.

Q You continued to participate in it?

A For about a year.

Q Mr. Spoerl was there on behalf of Exeter Manufacturing?

A Yes.

Q And Mr. Weiss was there on behalf of United

Merchants?

A Yes.

Q Mr. Gusman represented J. P. Stevens?

A Yes, sir.

Q And you and Mr. Clark represented Clark-Schwebel?

A Correct.

Q Mr. Schwebel, do you recall antoher pricing meeting at the Murray Apartments?

A Yes, sir.

Q Is that subsequent to the meeting at the Berkshire Hotel?

A I don't know.

Q Can you tell me what was discussed at the meeting at the Berkshire Hotel?

MR. TOPKIS: All of this is set forth in a Government information which was filed against Mr. Schwebel and various other defendants. It was there said that there were meetings also in Bryant Park, at the Murray Apartments, and so on. Are we going through every one?

THE COURT: Are you going to offer that in evidence?

MR. TOPKIS: I certainly propose to, yes.

MR. ATLAS: You propose to offer the Government information in evidence?

MR. TOPKIS: I certainly propose to, yes.

MR. ATLAS: You propose to offer the Government information in evidence?

MR. TOPKIS: Absolutely.

THE COURT: Do you want to have Mr. Schwebel identify it?

MR. TOPKIS: BY all means.

Q Mr. Schwebel, your counsel has handed me a document --

MR. TOPKIS: I am not Mr. Schwebel's counsel, but we are good friends.

Q Okay. Your good friend, Mr. Topkis, has given me a document premarked as Defendant's Exhibit 290. I would like you to look at it and tell me if you can identify it.

MR. TOPKIS: I will stipulate. It is the information which government attorneys duly authorized by the Attorney General of the United States filed in this court.

Q Will you answer, Mr. Schwebel?

A Repeat the question. Can I identify this?

Q Yes.

A Yes. This is the information that was filed by the United States Government.

Q Who were the defendants in that action brought by the United States Government?

A I will be glad to read it. Burlington Industries, Incorporated, Clark-Schwebel Fiber Glass Corporation, J. P. Stevens & Company, Incorporated, United Merchants & Manufacturers, Incorporated, Exeter Manufacturing Company, Incorporated, Coast Manufacturing & Supply Company,

Incorporated, Raymond F. Clark, Jack P. Schwebel, Harry F. Goldsmith, Robert E. Spoerl, and Irwin J. Gusman.

MR. ATLAS: At this time, with the consent of Mr. Topkis, I wouldoffer this in evidence.

MR. TOPKIS: No objection, your HOnor.

THE COURT: Received in evidence.

(Plaintiff's Exhibit No. 866 was received in evidence.)

Q Now, Mr. Schwebel, the meeting which was held in the Berkshire Hotel with Mr. Clark, Mr. Gusman, and Mr. Spoerl, you discussed at that meeting the mechanics of the price fixing; is that correct?

A I don't think we discussed the mechanics because the mechanics had long since been in operation.

Q What were you discussing?

A Current price levels, current market conditions, as a generalization. Now, I cannot elucidate to you the detail s of the discussion of some twelve years ago.

Q You can't really remember the details at this point?

A No.

Q Can you recall whether decorative fabric prices were discussed?

A They definitely were not.

Q That's the one aspect you can definitely remember?

A I can tell you, sir, that there was never an occasion at any meeting with any competitor under any circumstance at any time that related to decorative fabrics or the discussion thereof.

Q That's the one fact that you have no doubt about; is that right?

A It's not the one fact. I think I have testified to many other facts, sir.

Q I think you have indicated that you attended a meeting at the Murray Apartments; is that correct?

A Yes, sir.

Q Who was present at that meeting?

A To the best of my recollection, Bud Travis and Irwin Gusman.

Q Is that Bud Travis the same as Charles Travis you talked about earlier?

A Yes.

Q Do you recall when that meeting was?

A Either in 1961 or 1962.

Q Do you recall what was discussed at that meeting?

MR. TOPKSI: Your Honor, I tried to shorten this

by offering the information.

THE COURT: I will allow him to continue.

A No, sir, I don't recall the specifics of that.

Q Do you reca-l if decorative fabric prices were discussed?

A No.

Q You are definitely sure about that?

A Certainly, because neither Mr. Travis nor Mr. Gusman had any responsibility whatsoever in their respective companies for decorative glass fabrics, so there would be absolutely no point in discussing it.

Q I thought it was your testimony earlier you really weren't familiar with the inner workings of the other companies. Are youtelling us now that you were aware of the avenues of communication at Burlington and J. P. Stevens at this time?

A I would be glad to explain that. I testified this morning that I cannot tell you what prices were paid for yarn by my competitors because I had no access to the internal purchase orders or invoices of my competitors. I did not make the statement, Mr. Atlas, that I am unfamiliar, as someone who has been in this business his entire life for 27 years, with the general organizational structure of the fiber glass business, and I reiterate to you that Mr.

Travis has, to the best of my knowledge, only had responsibility at Burlington for industrial glass fabrics, and I can tell you with equal certainty Mr. Gusman has only had responsibility for industrial glass fabrics at Stevens.

Now, that is something that is of common knowledge to thousands of people in the fiber glass indusy and requires no pipeline into J. P. Stevens or Burlington to acquire that information.

Q But it would require a pipeline, wouldn't it, Mr. Schwebel, to find cut exactly what Mr. Travis talked to people about at Burlington and what Mr. Gusman talked to people about at Stevens?

A When I was not there?

Q When you were not there.

A Not unless they told me.

Q So you wouldn't know; correct?

A No, your question was relating to a meeting I was attending. The- did not discuss decorative glass fabrics, Mr. Atlas, when I was present at a meeting at the Murray Hill Apartments.

Q That's right. You testified that you specifically recall definitely they did not discuss decorative prices at that meeting, but you don't have knowledge about --

MR. TOPKIS: That is not what the witness testified at all, and so I object to the question as a matter of form. It is an inaccurate recital of his testimony which has been repeated four times.

MR. ATLAS: I will rely on what the transcript reveals as the answer to the question.

MR. TOPKIS: Fine.

THE COURT: Go ahead.

Q Did you attend a meeting at Bryant Park?

A I wouldn't call it a meeting, Mr. Atlas.

Q What would you call it?

A In a sense of the meetings you referred. to. I had a conversation with Bob Spoerl of Exeter one time in Bryant Park.

Q Was that a chance meeting?

A No. Bob Spoerl, whose home and business was in Exeter, New Hampshire, was in New York City. He didn't have a place to hang his hat, so to speak. He called me on the phone and said, "Can we get together for a while some time today?" It was a nice day, spring or fall or summer, the weather was fairly good. I said, "Where are you now?"

He said, "Across the street from the Public Library."

I said, "Stevens' office is only two blocks away;

why don't I walk over and I will meet you in Bryant Park."

Q Was this a matter of urgency that Mr. Spoerl wanted to talk to you about?

A I think you would have to ask Mr. Spoerl that.

Q You tell me what Mr. Spoerl told you.

A When he telephoned?

Q At this meeting, at this conference, at this get-together in Bryant Park.

A The only thing of consequence that I can remember that he told me was that he was very upset with Gusman's practices of late in pricing in the industrial fiber glass fabrics business.

Q Did you have any discussions at that time with respect to the decorative fabric business?

A No, we did not.

Q Did you attend a meeting at the Cheers Restaurant?

A Well, I had lunch at the Cheers Restaurant I would say a hundred to one hundred fifty times a year, because that restaurant was directly across the street from my office at J. P. Stevens and was the ordinary place that we had lunch if something else didn't come up.

So, yes, I had lunch many, many times at Cheers.

Q Do you recall a meeting or a conference or a lunch

that you had at the Cheers Restaurant where you discussed fiber glass fabric prices with competitors?

A I don't recall the specific meeting, Mr. Atlas, but I would feel out of the best of my memory that there may have been at least one such meeting with competitors at Cheers.

Q Do you have any specific recollection of a meeting?

A No, I don't, sir.

Q Are you familiar with a restaurant called the French Shack?

A No, I'm not.

Q Are you familiar with a restaurant called the Town House?

A No, sir, I am not.

Q Do you recall any other meetings that you attended with your competitors to discuss the fixing of prices in the fiber glass fabric industry other than what you have already testified to?

A No. I think there may have been more than one meeting, let's say at the St. Moritz, it's possible we met there twice or three times over a five-year period, but, as I indicated this morning, Mr. Atlas, the only meeting that I can really focus upon was the first one in terms of its

content.

Q You mean the luncheon meeting with Mr. Clark and Mr. Weiss?

A Correct.

Q But that one you don't remember where it was?

A Not to the extent that I would be willing to testify I know where it is.

Q We won't want you to do that. If you recall where it is, fine.

A No, I do not.

Q Have you told us everything you remember about these meetings?

A I have told you everything of the general nature of the meetings, Mr. Atlas. Obviously, I an recall minor bits and pieces out of context of various meetings. I remember, for instance, if it means something to the Court and to the jury, a discussion of the price of Style 181 in a 44 inch width with a volan finish.

Why that sticks in my head I can't tell you, and I don't think it has any particular significance, but this happens to be a style glass fabric bought by some pre-impregnating companies in California, and I remember that we once discussed that particular style.

Q As far as you are concerned, have you told me and the jury each of the individuals, to the best of your

recollection, who attended these meetings?

A Yes, sir.

Q Did any of the Goldsmiths ever attend these meetings?

A I don't recall.

Q Now --

A Pardon me, sir. I believe that on one occasion I had a meeting with Harry Goldsmith, and I don't know what the subject was, or even if it was related at all to price fixing, but I do recall meeting and having lunch with Mr. Goldsmith at a restaurant on Broadway in the general textile area at one time.

Q That's Mr. Harry Goldsmith?

A Harry Goldsmith.

Q Do you ever recall having a discussion with Harry Goldsmith on the train coming to work one morning?

A Yes, I do.

Q Did you discuss decorative fabric prices at that time?

A No, sir.

Q Did you discuss the decorative fabric industry at all at that time?

A Not that I recall, sir.

Q Are you sure about that?

A I have answered it, that to the best of my memory of a chance meeting on the New Haven Railroad ten or twelve years ago I have no recollection of discussing decorative fabrics with Mr. Goldsmith.

Q Do you recall when that was?

A Oh, I would say it was in about 1961 or so, shortly after Clark-Schwebel went into business, at a time which I doubt that we were even in the decorative fabric business at the time.

Q Mr. Schwebel, I show you Plaintiff's Exhibit 415 for identification, and ask you if this refreshes your recollection at all as to your conversation with Mr. Harry Goldsmith.

A I have never seen this memorandum. It appears to be an internal memorandum of Hess-Goldsmith.

Q That's right.

A It is an internal memorandum from Mr. Goldsmith to Mr. Russell, and the subject is Clark-Schwebel, and he refers to --

THE COURT: Are you offering it in evidence?

MR. ATLAS: I will.

THE COURT: I wouldn't read from it until it's been received in evidence.

MR. ATLAS: Okay. I will offer this in evidence

as Plaintiff's Exhibit 4515.

MR. HARDISON: What is it?

MR. ATLAS: An internal office memorandum I would like to use to help Mr. Schwebel recall his conversation with Mr. Goldsmith.

MR. TOPKIS: Then you don't have to offer it in evidence.

THE COURT: You don't have to read from it. Show it to him.

Q Directing your attention to the fourth paragraph, does that refresh your recollection as to your conversation with Mr. Goldsmith?

A May I take the liberty of reading the entire memo, which I have never seen, before I take it out of context in the fourth paragraph?

Q By all means, Mr. Schwebel.

A Shall I read the fourth paragraph you are referring to?

THE COURT: No. Does it refresh your recollection?

A I don't remember having that specific aspect of this discussion with Mr. Goldsmith.

THE COURT: Then it doesn't refresh your recollection.

THE WITNESS: I would assume, your Honor, if he

dictated this at the time it may have happened, but I have no recollection of it.

Q Mr. Schwebel, who is Mr. A. B. Trudgian?

A Mr. Trudgian was some years ago the general counsel of J. P. Stevens -- house counsel.

Q Did you ever have any discussions with him about the price fixing agreement?

A I recall informing him of it. Whether it was in discussion form I don't remember the specific conversation, but I do recall writing to him on the subject.

Q Mr. Schwebel, I would like to show you Plaintiff's Exhibit 327 for identification, asking you if you can identify it.

A Yes. This is the memorandum I had in mind.

Q What is that memorandum?

A It is a memorandum from me to Mr. Trudgian in June 1957 regarding the general antitrust question.

MR. ATLAS: I offer this in evidence.

MR. TOPKIS: I object to it on the grounds it doesn't have anything to do with the issues we have before us. If your HOnor will take a look at it, I think you will see that. It is not very significant one way or the other.

THECOURT: Subject to connection with this case,

I will receive it.

(Plaintiff's Exhibit No. 327 was received in evidence-)

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Q Who is R. M. Johnson?

A I believe that Dick Johnson was in the administrative end of the synthetics division of J. P. Stevens in North Carolina when I was associated with Stevens.

Q Did you say the synthetics division?

A Yes, sir.

Q Mr. Schwebel, I would like to show you Plaintiff's Exhibits 262, 266 and 281 for identification. I would like you to identify them, please, if you can.

A No. 262 is a memorandum that I wrote to my associate Ray Clark in May 1961 regarding decorative glass fabrics.

No. 266 is a memorandum on the same subject in November -- it appears to be 1961.

And No. 281 is a memorandum I wrote to Mr. Nordheim on August 30, 1963, and it appears to be just a copy of the statistics of the United States Census Bureau as they are published quarterly from census reports of --

Q Don't read from it until I offer it in evidence. Just identify the document.

MR. ATLAS: At this time, your Honor, I would like to offer Exhibits 262, 266 and 281 into evidence.

Any objection?

MR. TOPKIS: I certainly object to it. These are internal memoranda of what looks like Clark-Schwebel. I don't see the other defendants have any connection with them at all.

MR. ATLAS: I would like them received in evidence subject to connection.

THE COURT: All right. Received subject to connection.

(Plaintiff's Exhibits Nos. 262, 266 and 281 were received in evidence.)

Q Mr. Schwebel, do you recall with respect to these price fixing meetings you have been testifying to as to any one of them that may have occurred in or about February of 1962? Does that date strike a bell with you at all?

A No, it doesn't, Mr. Atlas.

Q Do you recall whether in February of 1962 there was an increase in the price of industrial fiber glass fabrics?

A No, sir, I don't specifically recall that.

Q I show you Plaintiff's Exhibit 270 for identification, and ask you if that refreshes your recollection.

A This is not a memorandum of my company. I have never seen it before, so how could it?

Q Does the document itself refresh your recollection?

A Let me take a moment to read it, please.

MR. ATLAS: Surely.

(Pause.)

A This is in the context, I gather, of your prior question as to whether I recall there was a price increa: of industrial glass fabrics in 1962; is that correct, sir?

Q Yes.

A Well, this memorandum refers to decorative fabrics so it has no relation to the prior question.

Q If my prior question was related to industrial, I do apologize. The question should be: do you recall if there was a decorative fiber glass increase at that time.

A I have no recollection whatsoever of that.

Q Of there having been a decorative price increase?

A Well, I --

Q I am not trying to badger you. You either remember or you don't.

A I certainly do not remember.

Q If the document does not refresh your recollection, please say so.

A It does not.

Q Do you know whether there was an industrial price increase at that time?

A No, sir. I do not recall that.

Q I will show you Plaintiff's Exhibit 269 for identification, and askyou to identify it.

A Here again this is a telegram -- I see. Well, this telegram refers to a price change on industrial fabrics. That's correct. By Hess-Goldsmith and Burlington.

Q And who is the telegram addressed to?

A Well, Clark-Schwebel, from the time it went into business, purchased glass fabrics --

Q Mr. Schwebel, just so we can expedite it --

A It is addressed to Clark-Schwebel.

Q Thank you.

A As a customer of Burlington.

MR. ATLAS: At this time I offer in evidence Plaintiff's Exhibit 269.

Any objection?

MR. TOPKIS: It doesn't mention Stevens, but aside from that I have no objection.

court in California.

Q Did you authorize its filing?

A I was not aware of it, to the best of my memory.

Q You were not aware this proof of claim was filed?

A I don't recall ever having seen it or having disucssed it with the attorney who wrote it.

MR. ATLAS: Your Honor, at this time, with the defendnat's consent, I would like to offer into evidence this proof of claim which is a certified copy of the United States District Court, Central District of California.

MR. TOPKIS: No objection from us, your Honor.

MR. HARDISON: I don't have any objection.

(Plaintiff's Exhibit 867 receivedin evidence.)

MR. ATLAS: I would like to read one statement in paragraph 2 to the jury.

(Mr. Atlas read to the jury from Plaintiff's Exhibit 867 in evidence.)

Q Mr. Schwebel, does that refresh your recollection as to how much Clark-Schwebel was owed when Textura went out of business?

MR. MC GANNEY: I object to the form of the

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question. I think there is a time between the going out of business of Textura and the time that this claim was filed.

THE COURT: Sustained as to form. As of that date, whatever that date is.

THE WITNESS: Sir, according to the top of this document this was filed April 12, 1967, which would be six or eight months after Textura went out of business. The sum referred to here, of course, is less than the sum that I mentioned, which was as of the prior fall, and it may well be -- and my best belief at this moment, subject to verification -- is that we probably sold some of the merchandise that we had in stock for Textura's account to other people and in effect credited Textura for the value of the merchandise thatwe were able to dispose of elsewhere.

Q I see. So that would account for the reduction from the $75,000 to the $52,000?

A That would be my best judgment at the moment.

Q I would like to show you a document entitled United States District Court, Central District of California, in the matter of Textura, Ltd., a California Corporation, and ask you if you can identify it.

A No, sir, I'm sorry, I have not previously seen

Q Did there come a time in about the middle or late 1965 that Clark-Schwebel and Textura began to have disputes concerning the quality of the merchandise shipped to Textura by Clark-Schwebel?

A Yes, sir.

Q Did Clark-Schwebel issue any adjustments to Textura for the claims made by Textura in this regard?

A I recall that we agreed as part of a package agreement in the sum of 1966 to a $12,000 quality adjustment credit.

Q How about in 1965? Did you issue any quality adjustments?

A I don't have any recollection of that one way or the other.

Q And in 1966 prior to the time of the settlement of your dispute did you issue any credit adjustments?

A I don't think we resolved the validity --

Q Yes or no, Mr. Schwebel?

A I don't recall any one way or the other, as I said to the prior question.

Q Now, Mr. Schwebel, would you say that Textura made more complaints than the balance of your customers concerning the quality of merchandise delivered by Clark-Schwebel to Textura?

A More complaints that the balance or more complaints than other customers?

Q More complaints than other customers?

A Yes, sir.

Q Substantially more?

A Or decorative customers, yes, sir.

Q In fact, that peeved you, that upset you?

MR. TOPKIS: May I have the question?

(Question read.)

A Well, naturally, any company which is trying its hardest to deliver an acceptable quality product is not pleased to have complaints. i don't know that I became peeved or upset. It concerned us.

Q You were displeased?

A I would say "concerned us" is a better characterization'

Q How about displeased?

A If the complaint in our judgment --

Q I am just asking, were you displeased by it?

A When we found that the complaints were not warranted.

Q Were you displeased by the complaints, Mr. Schwebel?

MR. TOPKIS: By the making of the complaint?

Q By the number of complaints that were substantially more than your other customers? Did it irritate you?

A I was not happy about it.

Q Incidentally, Mr. Schwebel, Clark-Schwebel had a practice of holding goods that were woven for Textura until it called them out, did it not?

A Within reasonable time limitations.

Q Did it or didn't it?

A Yes, it did.

Q These quality disputes between Clark-Schwebel and Textura came to a head in the latter part of 1965 and the beginning of 1966, did they not?

A Yes, sir.

Q And Mr. Nordheim principally dealt with Mr. Powrie on these matters?

A That is correct.

Q There came a time, did there not, in 1966, subsequent to the coming to a head of these quality disputes that Clark-Schwebel Fiber Glass invoiced Textura for all of the goods Clark-Schwebel was holding on behalf of Textura? Isn't that correct?

A Yes, sir.

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Q Now, prior to the time that you did this -- and this, if I may refresh your recollection, was in March of 1966, was it not?

A Approximately, sir.

Q Prior to that time had you ever invoiced Textura for goods that they had not called out of your warehouse?

A I don't believe we did.

Q So that was the first time that occurred, right?

A I think we extended them that courtesy for five years, yes.

Q All right. So for five years you had never shipped goods to them without calling them out, and I assume you had never invoiced goods to them without them calling the goods out. So this was the first time you had done this?

A Under a new set of circumstances, yes.

Q I ask you to answer yes or no, Mr. Schwebel.

A You asked me the question, and I said the answer was yes.

Q Thank you.

Now, at the same time is it not true, Mr. Schwebel, that you stopped extending credit to Textura

in March of 1966? You cut off their credit, didn't you?

A Well, I cannot precisely recall each sequence of events. There was a period of time when we asked them to pay cash for new shipments because of the --

Q Let me ask you a question.

MR. TOPKIS: May the witness finish his answer.

MR. BURGESS: He has finished his answer.

MR. TOPKIS: No, he hasn't. He was in the middle of sentence, quite clearly.

Q You said that in March of 1966 you began requiring they pay cash, is that not true?

MR. TOPKIS: For new shipments is what he said.

A During that spring. I can't identify March as the month, but during the first half of 1966 we put them on a COD basis.

Q Your understanding of COD means that in order for Textura to draw out goods it has to pay cash dollars to you, right?

A Correct.

Q And that's not credit, is it?

A On delivery of the merchandise.

Q And that's not credit, is it?

A It's not open credit, no.

Q It is not credit, period?

A Well, that's a question of definition. We didn't cut off shipments to them.

Q I am not asking you that, Mr. Schwebel.

A Then within that context I would say we didn't give them open credit terms.

Q You didn't give them credit, period, after March of 1966?

A I identified it as the spring. Perhaps March, yes.

Q At the same time in March of 1966 -- as of March, 1966 you had invoiced Textura for all the goods which Clark-Schwebel was holding for it in its warehouse, and also you put them on a cash basis.

Now, had you ever prior to this time put them on a cash basis?

A I don't believe so.

Q So that was the first time for that too.

Now, these invoices that you sent Textura for all the goods in your warehouse, these covered the goods which were subject to the quality dispute between

ing calls.

Q All right. Let's start with the calls you placed.

A I can't tell you which I placed and which I received. I can tell you the people I talked to, if that's what you want.

Q All right. Let's start with Burlington, the defendant Burlington.

A All right.

Q Who did you talk to from the defendant Burlington?

A Charles Kelley of their credit department.

Q This was shortly after the arbitration was filed, do you recall?

A Yes. When you say"shortly," it was after the arbitration was filed.

Q And at that time did you advise Mr. Kelley of Clark-Schwebel's position on the arbitration?

A Yes, sir.

Q In fact, at that time you advised Mr. Kelley, did you not, that Clark-Schwebel had cut down deliveries to Textura, isn't that correct?

A Well, I don't specifically recall the sentence including such words,but since we had and since we were

having a general discussion of the situation, I may well have.

Q You probably did?

A I would think so.

Q And you probably told him as well that you stopped accepting orders for new contracts from them, is that correct?

A Those were the facts.

Q And you advised Mr. Kelley of this?

A To the best of my recollection.

Q Didn't Mr. Kelley say to you at this conversation that he was likewise going to reject new orders from Textura?

A I don't recall one way or the other, Mr. Burgess.

Q And that he would only continue same if he was furnished with Mr. Powrie's personal guarantee?

A Well, I recall a general discussion of personal guarantees at a certain point with Mr. Kelley. I can't identify it to a specific phone call, but I was aware that Burlington was seeking, as we had sought, a personal guarantee from Mr. Powrie.

Q Did Mr. Kelley say to you that he was going to reject new orders from Textura? Do you recall

him saying that?

A I don't recall one way or the other.

Q You don't recall one way or the other. Well, in effect, what you are saying is Mr. Kelley said he was going to take the same action you were, isn't that right?

A No, sir. He certainly wasn't --

Q Now, did you have any further conversations with Mr. Kelley at this time?

A I don't recall whether I had one or more conversations with Mr. Kelley. It may have been one and it may have been two or three.

Q You say there may have been as many as three?

A I couldn't assign a number to it at all.

Q Probably more?

A Well, I don't think it would have run into the dozens, but it is conceivable there were several.

Q As many as 1[illegible]?

A I doubt that.

Q Right?

A Well, we won't play a numbers game, but I would say my guess would be -- and I am identifying it

as a guess -- three, four, two, in that area, but not --

Q Three or four?

A -- not in the eight, ten, twelve categories.

Q Three or four times?

MR. TOPKIS: Or two.

A Or two.

MR. BURGESS: Is Mr. Topkis testifying?

MR. TOPKIS: Only when you misstate the witness' testimony.

MR. BURGESS: I am not misstating the witness' testimony.

THE COURT: Please continue.

Q But, Mr. Schwebel, you did communicate to Mr. Kelley that Clark-Schwebel had cut down deliveries to Textura and had stopped accepting orders for new contracts from them, right?

A I believe so.

Q You believe so.

Now, you communicated this action to Mr. Kelley for some reason, did you not? There was some reason for you to communicate this action to him?

A They initiated the call and asked the question. It was in answer to his question. If

I initiated the call it was for a different reason.

Q Let's say you initiated the call. In that event you made this communication to them on the basis that you expected them to take some action?

MR. MC GANNEY: I object to the question.

A No, sir. My normal purpose in calling credit --

Q I am just asking you a question --

THE COURT: He is trying to answer it.

A I would like to answer it.

My purpose in calling the credit manager of other companies regarding a common customer was to -- was and is because it is a normal practice that goes on today, to determine their credit experience and status of their credit relationship with that account. And that was the purpose of my calling Mr. Kelley.

Q But it is true that when you called Mr. Kelley and communicated this action -- well, supposing you just -- did you volunteer this information to him?

A First of all, we are not saying that I called Kelley. I don't recall. In the course of a telephone call with Mr. Kelley, which I do recall, you are asking the question whether I volunteered the information about the arbitration, sir, is that the

question?

Q Yes.

A Well, I'm not certain whether at the time of that telephone conversation he may not already have been aware of the arbitration, but I would not have hesitated, in response to his question, if he said, "Did you file an arbitration?" to reply in the affirmative.

Q But you might even have volunteered this information?

A I might have.

Q You might even have supplied the information whether he asked for it or not, is that right?

THE COURT: Do you recall what happened, not what might have been?

THE WITNESS: No, sir, I don't recall the specifics of the conversation that well.

Q Mr. Schwebel, at this time, just to refresh your recollection regarding your conversations with Mr. Kelley -- and this may be a little confusing to you -- I am going to show you Plaintiffs' Exhibit 146 and refer you to the last paragraph thereof. I hasten to add this is a memorandum from Stevens' files written by Mr. Janetschek of Stevens reporting,

allegedly, on a conversation.

A This has nothing to do with Mr. Kelley then?

Q It has reference to Mr. Kelley in it and I would like you just to refer to the last paragraph on the first page and see if that refreshes your recollection as to a conversation you had with Mr. Kelley. Would you just read this last paragraph.

MR. MC GANNEY: Your Honor, I think the witness is entitled to read the whole document.

MR. BURGESS: Of course. Please do.

(Pause.)

A Yes, sir.

Q Does that refresh your recollection that Mr. Kelley --

THE COURT: Repeat the question and see if he can answer it now.

Q Does that refresh your recollection as to the substance of your conversations with Mr. Kelley?

A Not to any greater extent than what is stated here.

Q Fine.

A As stated here by Mr. Janetschek.

Q Did there come a time, having read this memo,

MR. BURGESS: Your Honor, I request permission to read this memorandum to the jury, please.

THE COURT: Let them read it if you have extra copies.

MR. BURGESS: We will give them copies.

(Copies of Plaintiffs' Exhibit 146 in evidence given to the jury.)

THE COURT: We will take a short recess.

You can read it in the jury box and then take your recess.

(Recess.)

BY MR. BURGESS:

Q Mr. Schwebel, in your conversations with Mr. Janetschek you passed on what you learned from Mr. Kelley, about what the defendant Burlington was doing?

A According to the memorandum I just read it so states. So I would not dispute that.

Q Now, Mr. Schwebel, the amount of Clark-Schwebel's claim in arbitration was $92,000.

Referring to the meeting between Clark-Schwebel, between yourself and Mr. Powrie at the St. Regis Hotel on July 29, at that time you offered certain terms of settlement to Mr. Powrie, did you not?

A Yes, sir.

Q They were subsequently embodied in a letter dated August 4, 1966, were they not?

A Yes, sir.

Q Now, those terms, were, if I may just refresh your recollection, payment of $23,500 September 1, $23,500 October 1, and $23,000 November 1, and upon payment in full of that total of $70,000 you would issue a credit to Textura for some $12,000, a little over $12,000, and also Textura agreed to take out a fabric woven from this yarn that we were talking about.

Now, the yarn cost, I believe as stated in your initial letter in submission to arbitration approximately $10,000? Is that correct?

A If you will give me a moment, sir, to refer to this, I will try to find it.

Q Of course.

MR. McGANNEY: Are you talking about Exhibit 131?

MR. BURGESS: 131.

MR. McGANNEY: You say there is a reference to $10,000?

MR. BURGESS: I'm sorry, there is not a reference to $10,000.

Would you agree that the cost of the yarn repre-

sented in that $92,000 figure was approximately $10?

A I don't recall the amount the yarn was valued at, Mr. Burgess.

Q Well, just taking the settlement exclusive of the yarn, the terms you were asking were $70,000 out of a $92,000 claim plus the yarn? Is that correct?

A No, sir, because in the intervening period as I recall Powerie took delivery of a certain amount of woven fabric which was in the orignal arbitration letter of June 9 and he reduced his indebtedness to us by paying this on a C.O.D. basis.

Q So that your claim was less than it had been at the time the original submission was made?

A Correct.

Q And yet the terms you asked there were $70,000 over a three-month period?

A Approximately, yes.

Q So if Mr. Powerie had taken in some goods in the meantime outside of this -- this represents, lets say, $70,000 plus the yarn and the $12,000 credit, and that would add up to less than $92,000? Is that correct?

A No, I don't think so.

Q Well, you say he reduced it?

A The original $92,000 figure was reduced by the

amount of fabric that we shipped him on a C.O.D. basis.

Q Thank you, Mr. Schwebel --

MR. McGANNEY: Did you finish the answer?

THE WITNESS: No, I have not.

MR. McGANNEY: Let the witness finish the answer.

MR. BURGESS: I thought he had.

THE WITNESS: I'm saying that the amount of fabric that Mr. Powrie took in on a C.O.D. basis reduced the $92,000 figure. I'm not making the statement that it precisely reduced it from 92 to 70.

Q I just wanted to establish that that reduced the $92,000 figure so that the $70,000 settlement and the provisions for credit and the asking that he take in the yarn cost represent a settlement on the basis of some figure less than $92,000 at the time the settlement was entered into? Is that correct?

A Yes, sir.

Q After the settlement did you contact the personnel of the defendants Stevens and the defendant Burlington?

A I was in contact with them. Whether they contacted me or I contacted them I do not recall.

Q Do you recall contacting Mr. Janetschek shortly after the settlement and advising him that you did not intend to allow Textura to call out any of this fabric

memorandum prepared by Mr. Janetschek apparently at the time elucidates. He was apparently doing this at the time.

Q Did you intend to allow Mr. Powrie to call out fabrics to generate cash to meet these notes?

A I can't tell you years later what I intended at that time, Mr. Burgess. I know we had an agreement for him to pay a certain amount against those notes.

Q That wasn't the question.

You say you can't recall whether you let him call out fabric to generate cash?

A That is correct. I cannot tell you today what my intention was eight years ago.

Q In fact, you kept Textura on a cash basis subsequent to that time and for the rest of the year, did you not?

A We had put Powrie on a cash basis many, many months prior to this. We made no change.

Q Did you keep him on a cash basis subsequent to the time of the agreement?

A Yes.

Q Mr. Schwebel, was Mr. Nordheim in contact with persons from defendants Burlington and Stevens?

A With the credit people at Burlington and Stevens, I

produced in more complicated weaves than industrial fabrics, because they want to enhance this decorative appearance.

On the whole, decorative fabrics in summary are produced with an aim of pleading the end user, in most cases, the housewife, who buys them for her home, or, in some cases, an institution, a bank, an office building that may be installing them, in that type of construction.

Industrial fabrics, Mr. Topkis, in contrast are primarily produced to very rigid specifications. The constructions are highly standardized. There are scores of military, commercial and other types of specifications existing which delineate very precisely what the weight must be, the thickness, the tensile strength, and other factors.

Industrial fiber glass fabrics are employed not for decorative purposes, not for their appearance, but are woven and treaed chemically in many cases in order to create certain physical performance characteristics, such as their insulation value, their ability to serve as a strengthening agent in reinforced plastics, their ability to serve as a non-conductor of electricity in printed circuits, for laminates that are used in the computer industry, in telephone systems; industrial fabrics are employed for such diverse applications as packaging tape, flexible cable wrap, conveyor belts, golf clubs; most of

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us know fiber glass boats; and I could go on, Mr. Topkis, with a list running into hundreds of the technical applications of industrial fiber glass fabrics.

Q When one uses industrial fiber glass fabrics, does he care about its appearance?

A Not the esthetic appearance of it, no, sir.

Q Are industrial glass fiber fabrics used in conjunction with plastics, did you say?

A That is a major application, among others.

Q How do you use them there?

A It serves as a reinforcement. Plastics have many affirmative characteristics, such as easily moldable into shapes, easily colored, that sort of thing, depending upon the purpose. But most plastics have very, very limited tensile strength, so that fiber glass when molded with plastic results in a composite product which actually has a higher strength weight ratio than steel. In other words, a pound of fiber glass laminate is stronger than a pound of steel, or, conversely, for the same strength you can use less weight of fiber glass in plastic than steel.

That is the reason, for instance, that fiber glass fabrics are widely used to reinforce plastic items in aircraft. Every Boeing airplane has thousands of

SOUTHERN DISTRICT COURT REPORTERS, U.S. COURTHOUSE

CARLYLE MICHELMAN, Trustee of Textura, Ltd., in Bankruptcy Proceedings, et al.

vs.

CLARK-SCHWEBEL FIBER GLASS CORPORATION, et al.

-and-

VERNES F. GRAFSTROM

New York, October 25, 1974,
10:00 a.m.

Trial resumed.

- -

MR. BREINDEL: Your Honor, for our next witness we are going to call Robert Zimmerman. Mr. Zimmerman is being called out of order because he is here from Los Angeles.

R O B E R T E L Y Z I M M E R M A N, called as a witness by plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BREINDEL:

Q What's your address, Mr. Zimmerman?

A My home address is 4 Jib Street, Marina Del Ray.

Q And what is your office address?

A 608 South Hill Street, Los Angeles.

Q What's your present occupation?

A Certified public accountant.

Q For how long a period of time have you been a certified public accountant?

A Since 1955.

Q Could you tell the jury what it means to be a certified public accountant as opposed to an accountant?

A A certified public accountant, both in the State of New York, where I am certified, and California, where I am certified, has educational requirements as well as the requirement of passing written tests.

Q Are you a member of any professional societies?

A I am a member of the American Institute and the California Society.

Q American Institute of what?

A Certified Public Accountants.

Q How long have you been with your present firm?

A Actually, the present firm I am with is a continuation of the firm I started with in June of 1949.

Q Are your firms clients centered on any one

particular industry?

A The majority of our clients are in the textile industry.

Q What do you mean by the textile industry?

A Garment manufacturers, curtain and drapery manufacturers, fabric knitters, fabric jobbers.

Q Has this been true since you joined your firm?

A Yes, it has.

Q How many accountants are employed by your firm?

A We have two offices, one in San Francisco, in which we have two partners, and I believe nine on the professional staff, and an office in Los Angeles in which we have three partners, and 13 on the professional staff.

Q Who is in charge of your Los Angeles office?

A I am in charge of the Los Angeles office.

Q How many accountants were employed in the Los Angeles office during the period from 1964 through 1966?

A During that period there were three partners and it ranged between six and eight men on the professional staff.

Q Did your firm ever perform accounting

services for Glass Fabrics?

A Yes, we did.

Q Can you tell us how it came that you did perform accounting services for Glass Fabrics?

A We were recommended to Glass Fabrics by Mr. Larry Donnelly, who at that time was head of the credit department on the West Coast of Burlington Industries.

Q Did your firm also perform accounting services for Textura?

A Yes, we did.

Q And for Fenestra?

A Yes, we did.

Q Over what period of time did your firm render these accounting services?

A The first services we rendered was an audited statement as of December 31, 1958, and the last one we did was unaudited work through June of 1966.

Q Would you tell the jury the difference between an audited or certified financial statement and an unaudited statement?

A A certified statement is one in which we are present at the actual taking of the physical inventory. When goods are not in the house but at different locations we get direct confirmation from the

people holding those goods. We confirm all assets and liabilities.

On an unaudited statement, basically it is a matter of coming in, reviewing the books and records, and reviewing and preparing a financial statement.

Q Would you describe the accounting services your firm performed for Glass Fabrics and Textura?

A We performed an annual audited statement at December 31st, and quarterly unaudited statements at March, June and September.

Q Your firm prepared certified year-end statements for the years 1958 through 1965, is that correct?

A That is correct.

Q And your firm also prepared unaudited quarterly statements for 1965 through -- for 1959 through 1965, is that correct?

A I believe that is correct.

Q Did your firm prepare any unaudited statements for 1966?

A We prepared a March 31st unaudited statement, and we did prepare a June 30th unaudited statement.

Q During what period of time did you personally perform accounting services for Glass Fabrics and Textura?

A I was personally responsible and performed duties starting with the December 31, 1958 audited Statement through March 31, 1966.

Q Can you tell me why your firm only certified Textura's year-end statements?

MR. TOPKIS: Objection, your Honor. I suppose it is because that's what they were asked to do. Other than that, I don't think any response is proper.

THE COURT: Is that the reason, they only asked you to do it?

THE WITNESS: That we were only asked to give an audited statement once a year?

THE COURT: Okay.

Q In your experience, is it customary for most businesses to have certified or audited interim statements?

A No, it is not customary.

Q Are there any circumstances in your experience in which firms will ask for audited interim statements?

A There have been several times where we have been asked under special circumstances. At times for instance, where one client was selling his business, or if there was a special problem, such as a divorce action, but it is highly unusual.

Q Are you familiar with the books and records of Textura for the period from 1964 through June 30, 1966?

A Yes, I am.

Q As a result of your familiarity with these books and records, do you have an opinion as to the condition in which those books and records were kept?

A I think they were kept in very good condition.

Q Could you say if they were kept in as good condition as most of your other textile accounts?

A Yes, they were.

Q Were the books and records of Textura kept in such a condition that would allow you as an outside accountant to prepare financial statements fairly reflecting Textura's position?

A Yes, they were.

Q I believe you said you prepared all the year-end statements for Glass Fabrics and Textura for 1958 through 1965, is that correct?

A That is correct.

Q To the best of your knowledge, were these statements prepared in accordance with generally accepted accounting principles?

A Yes, they were.

Q I now show you a document in evidence, Plaintiffs' 36, which is the certified year-end report for December 31, 1965.

Did you prepare that report, Mr. Zimmerman?

A Our office prepared that report, yes.

Q Were you personally in charge of this report?

A Yes, I was.

Q Would you read to the jury the note on the first page of Exhibit A?

A "Outstanding direct risk accounts with the factor amounted to $124,467.27 at December 31, 1965. We have been informed by the factor that the accounts on direct risk at December 31, 1965, have been substantially reduced during January and February, 1966."

Q Can you tell the jury what an outstanding direct risk account is?

A Yes. Textura was factoring its accounts, which meant that the factor approved the credit of most of the accounts before they were shipped.

When the factor did not approve the credit, Textura shipped the goods and the factor would then handle the collection of the goods -- of the invoice. But

if that invoice was not collectible it would be charged back to Textura.

Q The factor that you refer to in your note, is that Dommerich & Company?

A L. F. Dommerich & Company.

Q Can you tell me who at the factor advised you that the direct risk accounts had been substantially reduced in January and February, 1966?

A We would normally call either Mr. Bill Hornickel, who was in charge of the office, or Mr. Sam Thompson, who was working under Mr. Hornickel, and ask them for this information.

Q Can you recall who gave you that specific information?

A We do have a letter.

MR. BREINDEL: Would you mark for identification as Plaintiffs' Exhibit 869 a letter dated February 17, 1966, to Wilhelm, Zimmerman & Berman from L. F. Dommerich & Company.

(Plaintiffs' Exhibit 869 was marked for identification.

Q Can you identify Plaintiffs' Exhibit 869 for identification for us?

A Would you like me to describe it or --

Q Can you identify it?

A Yes.

Q Is that the letter you just referred to?

A Yes, it is.

MR. BREINDEL: At this time I would like to offer the letter in evidence.

MR. TOPKIS: I object to it, your Honor. A, it is hearsay, and, B, it has nothing to do with this case.

MR. BREINDEL: I think it has a lot to do with this case. It demonstrates from the period December through February direct risk accounts were reduced from $125,000 to $40,000.

MR. TOPKIS: It speaks of department risk accounts as of February 17, 1966. Really, I just don't see why we should clutter up the record with this kind of stuff.

THE COURT: It has very little to do with the case.

MR. BREINDEL: We are trying to show --

THE COURT: But I will let it in. It is hearsay, also.

(Plaintiffs' Exhibit 869 was received in evidence.)

Q Mr. Zimmerman, can you tell us generally how you went about preparing Textura's certified year-end statements?

A Yes. We would be present at the taking of the physical inventory.

THE COURT: I don't think there is any criticism of any year-end statement, is there, that this gentleman was connected with?

MR. BREINDEL: When the 1965 year-end statement, Plaintiffs' Exhibit 936, was put in evidence Mr. Topkis stated for the record he would have a lot to say about that.

MR. TOPKIS: That doesn't mean I am challenging Mr. Zimmerman's qualifications, nor the accuracy of his records.

THE COURT: Or the manner in which he did it.

MR. BREINDEL: I think it is relevant for background for him to tell how he went about it.

MR. TOPKIS: I am prepared to stipulate he did it as an expert accountant and I am prepared to stipulate he is an expert accountant and I will not offer a word of criticism against Mr. Zimmerman, his firm, or anybody who worked for him. If that

isn't enough to save us time, I will entertain suggestions, but I don't think we ought to waste time this way.

Q Mr. Zimmerman, in preparing Textura's year-end statements, would you rely on Textura's in-house statements in preparing your firm's year-end statements?

MR. TOPKIS: Objection. I can't imagine a more leadingquestion.

THE COURT: I will sustain the objection.

Q Mr. Zimmerman, in preparing your year-end statements or in preparing your quarterly statements, did Mr. Towrie ever direct you to put an entry on any financial statement?

A Never.

Q Did he ever ask you to remove an entry from any financial statement that your office had prepared?

A Never.

Q Mr. Zimmerman, I would like to show you a document which has been marked as Plaintiffs' Exhibit 47 for identification. Are you familiar with this document?

A Yes, I am.

Q Can you identify it for us?

A It is a penciled draft prepared by our office of comparative balance sheet as at June 30, 1966 and June 30, 1965, and a comparative income statement for the six months ended June 30, 1966 and June 30, 1965 of Textura, Ltd.

Q Is the printing on the first page of this exhibit your firm's standard or pro forma form covering letter for unaudited interim statements at that time?

A At that time, yes.

Q Similarly with respect to page 2, is the printing on that your firm's standard form or pro forma balance sheet form for unaudited interim statements at that time?

A Yes.

Q Apart from the printing, whose handwriting appears on this document?

A Mr. William Berman's.

Q Is this the type of six-month statement that your feirm had prepared for Class Fabrics and then Textura from 1959 on?

A Yes, it is.

Q Do you know who prepared this document?

A Mr. William Berman.

Q Was he a partner of yours?

A Yes, he was.

Q Mr. Berman is now dead?

A Mr. Berman died in October of 1967

Q Did Mr. Berman prepare it on behalf of your firm?

A Yes, he did.

Q Did Mr. Berman prepare Plaintiffs' Exhibit 47 for identification at the time or shortly after he reviewed Textura's books?

A Yes, he did.

Q Did you discuss this with Mr. Berman after he prepared it?

A Yes, I did.

Q Did you discuss the June 30 audit, 1966 audit, before he did it?

A Yes.

Q And while he was doing it?

A Before he did it and at is completion, yes, while he did it as well.

Q Was this statement, Plaintiffs' Exhibit 47 for identification, prepared in the regular course of your firm's business?

A Yes, it was.

Q Was it part of the regular course of your firm's business to prepare such statements?

A Yes, it was.

Q Is the original of this statement in your firm's files?

A Yes, it is.

MR. BREINDEL: At this time I would like to offer in evidence Plaintiffs' Exhibit 47.

MR. TOPKIS: A few questions on the voir dire, if I may, your Honor.

VOIR DIRE EXAMINATION

BY MR. TOPKIS:

Q Mr. Zimmerman, until this litigation began you had never seen this document?

A Would you repeat that, please?

A Until this litigation began you had never seen this document?

A That is not true.

Q When did you see it for the first time, sir?

A I saw this afrer it was prepared in June of 1966.

Q It was never submitted to Textura, was it?

A In pencil draft. It was never typed.

Q It was never typed?

A That is correct.

Q Is it your firm's normal practice to submit documents in pencil draft?

A It is occasionally our practice to submit documents in pencil draft in reviewing them with the client before typing them, yes.

Q You never actually typed up this document?

A This particular document was never typed.

Q And that was the first time in your history of your dealings with Textura or glass fabrics that your quarterly statement was not typed?

A To the best of my recollection, yes.

Q In fact, isn't this a tentative document thawt was never formally vouchered for by your firm?

A I don't understand your question.

Q Well, this document was prepared, was it not, for the purpose of discussing ig with the client?

A Yes.

Q And in the normal course following discussion, assuming agreement was reached, a final version would have been prepared and submitted as your firm's work?

A It has nothing to do with reaching a final agreement.

Q Reaching a final decision on your firm's part?

A Our firm had reached a final decision inthe drafting of the document.

Q Do you know that of your own knowledge?

A Yes.

Q Actually, you had nothing to do with the affairs of Textura after March 31, 1966?

A I was no longer responsible for that particular account after March 31, 1966.

Q In fact, you had nothing to do with Textura after March of 1966? Isn't that right?

A No, that is not right. I previously testified that I reviewed the work with Mr. Berman before he did the work and I reviewed the work with Mr. Berman after he did the work.

Q Are you sure of that, Mr. Zimmerman?

A Yes, I'm sure of that.

Q Weren't you asked this question and didn't you give this answer in your deposition at page 180 by Mr. McGanney:

"Q Were you aware that the item was written off the balance sheet in August, 1966?

"A We have already covered that. I have nothing to do with the company, really, after March of 1966."

A Yes, but I believe also in my original deposition that I did state that I reviewed these particular figures with Mr. Berman.

Q The figures that you discussed with Mr. Berman were what?

A The June 30, 1966, statement.

Q The whole statement

A The whole statement.

Q Weren't you asked these questions and didn't you give these answers at page 205:

"Q Did Mr. Berman discuss anything else with respect to the examination of Textura's books as of June 30, 1966?

"A Not that I could recall at this time.

"Q The only item that you can specifically recall is the Del Webb job?

"A Correct."

A But in the normal --

Q Were you asked those questions and did you give those awnswers?

A Yes, I did.

Q Were they true?

A Yes, they are, but in the normal course in our office before the finalization or typing of any report each

partner normally sees it. The review with Mr. Berman was on a particular matter. I did see these figures when they were completed.

Q But the only thing that you discussed with Mr. Berman was the Del Webb job?

A Specifically the Del Webb job.

Q Otherwise, you had no discussion with him about this draft report?

A That is right.

Q So this was his work and not yours?

A That statement, yes.

MR. TOPKIS: That is what I understood. That being so, I object. Mr. Berman, unfortunately, is not available.

THE WITNESS: It is a piece of work of our firm, may I say.

THE COURT: I will receive it.

(Plaintiffs' Exhibit 47 was received in evidence.)

BY MR. BREINDEL:

Q Now, Mr. Zimmerman, there came a time as you have testified when Mr. Berman replaced you as the accountant for your firm in charge of Textura's account?

A That is correct.

Q When was that?

A Some time after March 31, 1966.

Q Did you discuss Mr. Berman's replacement of you as the accountant with Mr. Powrie at the time?

A Not with Powrie, no, sir.

Q Did you discuss it with Mr. Moskowitz at the [illegible]e?

A No, I did not.

Q Do you know who Mr. Moskowitz is?

A Yes, I did.

Q Who is he?

A Mr. Moskowitz, I believe, is the president of L. F. Dommerich & Company.

Q Did you discuss it with Mr. Hornickel at the time?

A No, I did not.

Q Can you tell us who Mr. Hornickel is?

A Mr. Hornickel was in charge of the West Coast office of L. F. Dommerich.

Q Did you discuss it with Mr. Thompson at the time?

A No, I did not.

Q Who is Mr. Thompson?

A Mr. Thompson, I believe, was second in charge of

the West Coast office.

Q Did Mr. Moskowitz ever express any dissatisfaction to you with the manner in which you handled either Glass Fabrics or Textura?

MR. TOPKIS: Objection.

Suppose he did? Suppose he did not? What difference does it make. Mr. Moskowitz is not on trial here; neither is Mr. Zimmerman.

THE COURT: I sustain the objection.

Q Have you ever performed accounting services for Dommerich as a client?

A Our firm has, yes.

Q In what capacity?

MR. TOPKIS: If your Honor please, what is the purpose of this? Suppose he prformed accounting services for General Motors, what has it to do with this case?

THE COURT: We are waiting to hear.

MR. BREINDEL: There is a counterclaim in this case.

THE COURT: Go ahead.

MR. BREINDEL: If they want to drop the counterclaim I won't pursue this.

A The best way to describe it is we acted for a period of time as Dommerich's internal auditors on certain

accounts that they factored on a non-notification basis.

Q Since 1967 has your Los Angeles office handled any accounts which are also clients of L. F. Dommerich & Company?

A Yes, we have.

Q To the best of your recollection did Mr. Moskowitz, Mr. Hornickel, or Mr. Thompson ever complain to you that your year-end or quarterly statements were too favorable to Mr. Powrie?

MR. TOPKIS: Objection.

THE COURT: I thought I just ruled on that.

Q Let's turn to plaintiffs' Exhibit 47.

Are you aware, Mr. Zimmerman, that Plaintiffs' Exhibit 47, the June 30, 1966, statement prepared by Mr. Berman refers to a Mo-Vac distributorship as an asset in the amount of $200,000?

A Yes, I'm aware of that.

Q Can you tell us how this entry came about?

A This entry came about, I believe, it was the year-end December 31, 1964.

Would you like me to describe the conditions?

Q What were the circumstances under which this entry was first entered on Textura's books?

A I was shown a document which gave Mr. Powrie

the exclusive rights of distributorship of the process known as the Mo-Vac process. I was also also shown minutes of the corporation in which this right of distributorship was given to the corporation by Mr. Powrie. I was also shown an agreement, a tentative agreement with, I belive it was, Clark-Schwebel offering Textura $50,000 plus royalties to be able to distribute fabrics of the Mo-Vac process. Previously I had been shown the document which I believe was signed by Mr. Ray Clark of Clark Schwebel offering $100,000 for a half interest in the Mo-Vac process.

So as at December 31, 1964, it was my decision to put the process or the distributorship on the books of Textura for $200,000.

MR. TOPKIS: Your Honor, I move to strike all the witness' references to documents which are not in this record and which have not been shown to us.

THE COURT: Do we have this letter from Mr. Schwebel?

MR. BREINDEL: I am going to go into the documents, your Honor, but I think the witness can testify on what basis he made the decision.

THE COURT: And show us the documents?

MR. BERMAN: I am going to go into the documents.

THE COURT: Do you have the documents to show?

MR. BERMAN: Yes.

THE COURT: Show them to him and then we don't have to strike the testimony. The documents are the best evidence.

MR. TOPKIS: I have specific reference to the two letters from Clark-Schwebel. I know about the minutes.

Q Mr. Zimmerman, I now show you a document which has been introduced in evidence as Plaintiffs' Exhibit 500.

Can you identify that document for us?

A Yes.

Q What is it?

A This is the document which grants Mr. Powrie the exclusive distributorship rights of the Mo-Vac process.

THE COURT: That is already In evidence, isn't it?

MR. BREINDEL: Yes.

Will you mark as Plaintiffs' Exhibit 870 for identification a letter dated February 23, 1965.

(Plainfiffs' Exhibit 870 was marked for identification.)

Q Can you identify Plaintiffs' Exhibit 870 for identification for us?

A Yes, I can.

Q What is it?

A This is the tentative agreement between Clark-Schwebel and Textura.

Q Is that document signed?

A Yes, it is.

Q Who are the signatories?

A M. J. Powrie, president of Textura, and Jack P. Schwebel, of Clark-Schwebel Fiber Glass Corporation.

Q Is there a sum of money referred to in this document?

A Yes, the sum of money is $50,000.

Q Is this the document you were referring to in your tesfimony when you referred to, I believe, an offer of $50,000?

A Yes, it is.

MR. BREINDEL: I would like to offer in evidence Plaintiffs' Exhibit 870.

MR. TOPKIS: Your Honor, I don't object to this, but this is not an offer. To say that this is an ofer is to misuse the English language grotesquely. This is part of a document. This document is supposed to have two exhibits attached to it, an Exhibit I and an Exhibit A, and unless and until we see Exhibit I and Exhibit A I will object to the receipt of this portion of the total.

MR. BREINDEL: The issue here, your Honor, is if Mr. Zimmerman recalls looking at this document in making his decision to evaluate Mo-Vac.

THE COURT: And nothing else?

MR. BREINDEL: And nothing else.

MR. TOPKIS: Nothing else? He didn't see the document that he talked about before which had $100,000 on it.

MR. BREINDEL: This is not that document.

MR. TOPKIS: Okay.

MR. BREINDEL: He specifically referred to $50,000, I believe, in his answer.

THE COURT: Who furnished you with this?

THE WITNESS: At this point, sir?

THE COURT: No, at the time you prepared it.

THE WITNESS: Mr. Powrie showed me that document.

THE COURT: He showed you the other document referred to here.

THE WITNESS: No, he did not at that time.

THE COURT: This is what he based his decision on to put the valuation on. I suppose we have to receive it in evidence.

MR. TOPKIS: Just so the record may be crystal clear, your Honor, may I ask the witness one question?

THE COURT: Yes.

VOIR DIRE EXAMINATION

BY MR. TOPKIS:

Q Mr. Witness, there is reference here to Exhibits I and A. Do you see those references?

A Did I see -- I see the references in here, yes.

Q Were you shown Exhibits A and I?

A No, I was not.

MR. TOPKIS: For whatever it is worth then, I suppose it is in.

(Plaintiffs' Exhibit 870 was received in evidence.)

DIRECT EXAMINATION CONTINUED

BY MR. BREINDEL:

Q Mr. Zimmerman, I show you a copy of a document in evidence as Plaintiffs' Exhibit 839 and ask you if you can identify it for us.

A Yes, I can.

Q What is that document?

A These are the minutes of the corporation to

which I was referring in my answer on which I partially based the evaluation of the Mo-Vac distributorship.

Q You also referred in your answer, I believe, to seeing a document referring to a $100,000 offer from Clark-Schwebel, is that correct?

A Yes, I did.

Q You saw such a written document, is that correct?

A I saw such a written document.

Q And who showed it to you?

A Mr. Powrie showed it to me and gave me a copy of it.

Q Do you have the copy Mr. Powrie gave you?

A I do not.

Q Did you make any efforts to locate that document?

A I searched my files and at one point I searched the files of Textura for a copy of that document and have not been able to locate it.

MR. TOPKIS: Then I repeat my motion to strike the testimony referring to that document.

THE COURT: No. This is a matter for the jury.

Q Now, Mr. Zimmerman, did you ever discuss

Mo-Vac's value with Larry Donnelly?

MR. TOPKIS: With whom?

MR. BREINDEL: Larry Donnelly.

THE WITNESS: He is Burlington's West Coast representative.

A Yes, I did.

Q Can you tell us what you said to him and what he said to you?

MR. TOPKIS: Objection.

THE COURT: What was the conversation about?

MR. BREINDEL: The question is whether or not Burlington relied on the shown asset value of Mo-Vac on its statements. It pertains to the counterclaim. An element of the counterclaim is reliance on the statement.

THE COURT: All right. Go ahead.

MR. TOPKIS: This goes only to Burlington then, not to Stevens or Clark-Schwebel?

THE COURT: Yes.

MR. TOPKIS: Fine.

Q Would you like the question repeated, Mr. Zimmerman?

A Please.

MR. BREINDEL: Would you repeat my last question.

(Question read.)

A In speaking to Mr. Donnelly about the year-end figures --

Q Which year are you referring to?

A December 31, 1964, I believe it was --

THE COURT: '64?

THE WITNESS: '64. That's the date at which this asset was reflected on the balance sheet.

THE COURT: You are talking now about this Mo-Vac?

MR. BREINDEL: Yes.

THE COURT: All right.

A Mr. Donnelly, if I recall the conversation correctly, asked me what it was, and I explained it to him, and he told me that it made no difference in the granting of credit because all he looked for was the ability of the company to pay its bills, so he was interested in the current assets and the current liabilities and what the company was doing subsequent to the balance sheet date to show their ability to pay bills.

THE COURT: This was in 1964?

THE WITNESS: Actually, it would have been in 1965 after the release of the figures.

Q Did you ever discuss Mo-Vac's value with Mr. Moskowitz of L. F. Dommerich & Company?

A Not with Mr. Moskowitz, no.

Q Did you ever discuss it with any other representative of L. F. Dommerich & Company?

A We have had a discussion with Mr. Hornickel which was roughly the same as the discussion with --

MR. TOPKIS: Objection.

Q Just tell us what you said to Mr. Hornickel and what Mr. Hornickel said to you with respect to the value of Mo-Vac.

MR. TOPKIS: That I object to.

THE COURT: I will sustain that.

MR. BREINDEL: I think one of the issues in this case is why --

THE COURT: It is not what you think are the issues. It is what is admissible and what is not admissible. Just because it may reflect on an issue doesn't destroy all the rules of evidence.

Q As an expert accountant, do you have an opinion as to whether the Mo-Vac entry as it appears on Textura's books is in accordance with generally accepted accounting principles?

A Yes, it is.

Q Looking again at Plaintiffs' Exhibit 47, Mr. Zimmerman, can you tell me if that refers to prepaid expenses as an asset?

A It reflects prepaid expenses of $30,535.

Q To your knowledge, does any portion of that $30,535 refer to prepaid advertising expenses?

A I recently looked at the books of Textura. There is approximately $18,000 of that $30,000 that is prepaid advertising expenses.

Q Would you explain to the jury what this approximately $18,000 in prepaid advertising represents?

MR. TOPKIS: If there is a book that reflects this I would suggest that that is the best evidence of any such entry.

THE COURT: He said it represents advertising.

MR. TOPKIS: Yes.

MR. BREINDEL: I am asking him to explain to the jury what the $18,000 of prepaid advertising represents.

THE COURT: That would be shown by the books.

MR. BREINDEL: All the book says is prepaid expenses.

THE COURT: That's all it says?

Q What do the books say in that respect?

A The general ledger of the company has a spread sheet which is called "Prepaid Expenses," which reflects prepaid advertising in one column, prepaid taxes in another column, prepaid something else in a third column.

THE COURT: Without any itemization?

THE WITNESS: Not in the general ledger, no.

Q Can you now tell the jury what the approximately $18,000 in prepaid advertising represents?

THE COURT: How can he without itemization. He just asked him.

MR. BREINDEL: I think he knows of his own knowledge.

THE COURT: He knows more than what's in the books.

MR. BREINDEL: That's correct.

THE WITNESS: I was referring to the general ledger. There are backup records.

THE COURT: Are those records available?

MR. BREINDEL: Yes, your Honor.

THE COURT: That's the best evidence.

Q Do you have these books with you, Mr. Zimmerman?

A I don't have them in my possession, no.

Q I mean in the courtroom.

A I believe they are here, yes.

No, they are not in that folder. I believe the box that was just delivered.

THE COURT: Why don't we take a short recess for that purpose?

MR. BREINDEL: All right.

(Recess.)

MR. BREINDEL: Your Honor, at the recess defendants and I have stipulated, to save everybody's time, that the $18,000 we are referring to does in fact refer to prepaid expenses in connection with Plaintiffs' Exhibit 1, the Engineer's Guide.

MR. TOPKIS: Yes.

Q Now, Mr. Zimmerman, are you familiar with a document which has been introduced in evidence as Plaintiffs' Exhibit 1?

A Yes, I have seen this. I am familiar with it.

Q The $18,000 in prepaid expenses we were discussing before our brief recess, does that relate

to Plaintiffs' Exhibit 1?

A Yes. It is the remainder of the unreimbursed portion of expenses to create this Engineer's Guide.

Q How long has that account -- that is, prepaid expenses in connection with Plaintiffs' Exhibit 1 -- for how long a period of time was that carried on Textura's books?

A Actually, the bulk of the expense was created in 1965. I believe in excess of $70,000 or $80,000 was spent on this guide, of which something slightly in excess of $50,000 was reimbursed to the company by such companies as Dow Chemical, Owens-Corning and PPG -- Pittsburgh Plate Glass.

Q Do you have any opinion as to whether carrying these prepaid expenses in connection with Plaintiffs' Exhibit 1 on the books was a proper accounting entry.

A I will explain it in this way: It was felt -- I was informed that the rest of the money spent would be reimbursed. In January of 1965 $5000 was reimbursed by Dow Chemical. If I knew that it would not have been reimbursed I feel that it's a very proper prepaid expense to be written off over the useful

life of the Guide.

Q What was the basis for your belief in the beginning of 1966 that Textura would be reimbursed for this $18,000 balance?

A As I say, during 1965 in excess of $50,000 had been reimbursed. During January of 1966, another $5000 had been reimbursed. I had no reason to believe that the remainder would not be reimbursed.

Q Are you familiar with sample books as they are used in the textile industry?

A Very much so, yes.

Q Would you tell the jury what sample books are?

A Sample books are small swatches of fabric that are put in a book form -- for instance, each page would be a different color or a different fabric. These are made up by distributors of fabric and sent to their customers so that of somebody walked into a decorator and would want to buy draperies they would have a number of sample books from which to choose a fabric and a color.

Q Is Plaintiffs' Exhibit 1, the document we have been referring to as the Engineer's Guide, a sample book?

A No, it is not.

Q Going back to Plaintiffs' Exhibit 47, the June 30, 1966 financials, do they reflect good will as an asset in the amount of $58,000?

A Yes, $58,602.

Q Can you tell me how that entry originally came about?

A Yes. In December of 1964, Textura acquired Glass Fabrics. Textura acquired Glass Fabrics by assuming all of its assets and all of its liabilities. The liabilities were $58,602 in excess of the assets. We then called that excess good will.

Q And you had it placed on your interim and year-end statements as an asset in the amount of $58,000?

A It was placed on the books of account as $58,000.

Q Did Mr. Powrie direct you to make that entry?

A No, we did not.

Q Did you discuss this entry with Mr. Powrie beforehand?

A Only after the entry was made.

Q What was your discussion with Mr. Powrie with respect to this entry after it was made?

MR. TOPKIS: Objection.

THE COURT: I don't know what the purpose of it is. Has Mr. Powrie testified on the subject?

MR. TOPKIS: I don't think so.

THE COURT: I will sustain the objection.

Q Are you familiar with the manner in which Textura kept track of its inventory?

A Yes, I am.

Q Would you describe it for us?

A Textura, and Glass Fabrics before it, had what were called perpetual inventory cards for all inventory in the house where they recorded from an invoice what fabric came in by color and style and every time it was used the balances were reduced. They kept records of goods that it sent out to be finished. I mean they bought greige goods and sent it to a finisher to put the color in and to put the finish on it. They had records showing that they were at the finisher. They sent piece goods out to be made into drapes, and they kept records of that.

They had finished drapes on site ready to be installed, and they kept records of that. And at times they had what they called bill and hold goods,

whereby the mills would bill the company for fabric to be held in the mill's warehouse waiting for shipping instructions from the company. There were records of that.

Besides these records, there was a total dollar control kept of the inventory. By that I mean they would start with a beginning inventory, add to it all purchases affecting inventory, and every sale made by the company was costed out.

Q Would you explain that to the jury?

A If they were installing drapes in a building at the time of the billing of the job, the bookkeeper would take the cost of the fabric, the cost of making the drapes, the cost of installation, and arrive at a total cost to that job. That would be deducted from the beginning inventory and the additions to the inventory, so that there was always a total dollar figure at the end of each month as to what the inventory should be.

Q During the years you were the accountant for Glass Fabrics and Textura, did they also take a physical inventory?

MR. TOPKIS: Your Honor, I don't know what this is all about. I suppose they did take a physical

inventory. That's not in issue in this case so far as I am aware.

MR. BREINDEL: Certain answers to interrogatories pertaining to the counterclaim claim that there were inventory shortages, the inventory books were incorrect, and there were serious discrepancies in the way the inventory books were kept.

If you will stipulate to that not being an issue I will drop this line of questioning.

MR. TOPKIS: We didn't make any mention of inventory in the trial brief, and I don't know what we are wasting time about.

MR. BREINDEL: Would you like me to show you the interrogatories I am referring to?

MR. TOPKIS: I said it is not an issue in this case. Can't we go on to something else.

THE COURT: I don't know what more you want.

MR. BREINDEL: I am satisfied with that, your Honor.

Q Now, Mr. Zimmerman, were you authorized by Mr. Powrie to release any credit information in your firm's possession pertaining to Textura?

A Yes, I was. I was authorized to release

credit information to anybody with whom he was doing business.

Q For what period of time were you so authorized?

A That was from the time we took Mr. Powrie's account on as an account until the very end.

Q So that your authorization applied to Glass Fabrics and Fenestra as well?

A Correct.

Q To whom were you authorized to release this information?

MR. TOPKIS: To anybody and everybody, your Honor. Again we can shorten it. That is not an issue here either.

Q Were any restrictions ever put on the information that you could release to these people?

A Not that I can recall.

Q Can you tell us in connection with Textura and its predecessors what information was generally asked for by people seeking credit information?

MR. TOPKIS: Objection.

THE COURT: There is no issue on this point.

Q Did you frequently give credit information to Dommerich & Company?

A Yes, I did.

MR. TOPKIS: Objection.

THE COURT: Sustained.

MR. BREINDEL: Your Honor, one of the issues raised by the counterclaim is that Willhelm, Zimmerman & Company is a co-conspirator and is named in the counterclaim, that they gave false and misleading information, and I say that is irrelevant and I want to take that issue out of the case.

THE COURT: Go ahead.

Q Mr. Zimmerman, did frequently give credit information to Dommerich?

A Yes, I did.

Q Which individuals?

A Either Mr. Hornickel or Mr. Thompson.

Q Qan you tell us with respect to Mr. Hornickel what type of credit information about Textura or Glass

Fabrics he would ask you?

A He would ask for the latest financial statements; he would ask for subsequent events, sales since that statement, any unusual happenings in the company that I might be aware of, unfilled orders, anything that would give him an indication of how the company was doing and its ability to pay bills.

Q Did you ever to your knowledge give Mr. Hornickel or anyone else from Dommerich untrue information with respect to Textura or Glass Fabrics?

A I never did.

Q Did anyone from Burlington ever ask you any questions in connection with Textura's credit standing?

A Yes, I often spoke either to Larry Donnelly or Mr. Jack Cann, who was his assistant.

Q To the best of your recollection what kind of credit information would they ask you for?

A Identical to what I have just described.

Q In your discussions with Mr. Donnelly or Mr. Cann was the subject of the confidentiality of the information you were giving them raised?

A Whenever we release any figures on any client we always say that we are releasing these in confidence?

Q Did you ever get any requests for credit inform-

ation with respect to Textura, Fenestra or Glass Fabrics from J. P. Stevens?

A I don't remember any requests from J. P. Stevens.

Q Did you ever get any requests as to Textura, Fenestra and Glass Fabrics from Clark-Schwebel?

A I never remember any requests from Clark-Schwebel.

Q As an accountant do you frequently get calls from people who supply merchandise or services to your clients on credit?

A About ten a day.

Q How long a time have you been getting this type of call?

A Since I became a partner in the firm, which was in 1957, I have been handling this type of credit call.

Q Based on your dealings with the credit people do you have an opinion as to what type of information they generally seek about your clients?

MR. TOPKIS: Your Honor, I don't know what this has to do with this case.

THE COURT: I will permit it.

A The type of information that is sought is always the ability of that particular client to pay its bills. Credit men are basically interested on any current balance sheet in the current assets and the current liabilities.

We are always asked in giving credit information our knowledge of what has happened in the company since the date of that financial statement, what the sales are or have been, unusual transactions, open orders, items of that nature.

Q Going back to Plaintiffs' Exhibit 47, the June 30, 1966 statement, does that statement, Mr. Zimmerman, show the percentage of Textura's gross profits on sales for the first six months of 1966?

A Yes, it does.

Q What is that percentage? Tell us what page you are at.

A On the fourth page. It's marked "Comparative income statement, six months ended June 30, 1966 and six months ended June 30, 1965.

Q Could you tell us that percentage?

A The percentage that is reflected to June 30, six months ended June 30, 1966, is 38.8 per cent.

Q Does Plaintiffs' Exhibit 47 also show the net profits before taxes of Textura for the first six months of 1966?

A Yes, it does.

Q What is that?

A The profits are $55,646 pre-tax, and represents 6.9 per cent of sales.

Q In connection with Plaintiffs' Exhibit 47 do you know if it refers as an asset loans to Mr. Powrie and Mr. Johnstone totaling $19,828?

A Yes, on the second page under Other Assets the figure due from employees and officers, $19,829.

Q Do you know if those other officers are Mr. Powrie and Mr. Johnstone?

A I believe they made up the total.

Q Can you tell the jury who Mr. Johnstone was?

A Mr. Johnstone at one point was a stockholder and officer and head of the sales department of Glass Fabrics.

Q Do you have an opinion as to whether the entry on Plaintiffs" Exhibit 47 under Other Assets due from employees and officers $19,829 is an entry made in accordance with generally accepted accounting principles?

A Yes, it is.

Q On what do you base that opinion?

A These are moneys lent to the officers over a period of time in each year when we did our audited statement. These amounts were confirmed directly to us by Mr. Powrie and Mr. Johnstone both.

Q During the years your firm did work for Textura and Glass Fabrics did you also audit Fenestra's books and records?

A I believe up through December of 1964, at which time Fenestra was basically inactive.

Q Did Fenestra ever issue, to your knowledge, or have separate financial statements?

A I don't recall anything but Fenestra's statements being combined with those of Glass Fabrics.

Q Were all of Fenesta's expenses borne by Textura?

A While Fenestra was operating expenses were allocated either from Glass Fabrics or Textura to Fenestra based on sales.

Q But who paid those expenses?

A Glass Fabrics or Textura actually paid the expenses.

Q Were all of Fenestra's revenues credited to either Glass Fabrics or Textura?

A Yes, they were.

Q Do you know who Irene Sharpe was?

A Yes, Irene Sharpe was the bookkeeper at Glass Fabrics and then at Textura.

Q When did she start with Glass Fabrics to the best of your knowledge?

A Early in the 1960's; I would say probably 1960 or 1961.

Q For how long a period of time was she employed

by Textura?

A As far as I know as long as the company remained in existence.

Q Do you have an opinion as to the competency of Miss Sharpe as a bookkeeper?

A Yes, I believe she's a very competent bookkeeper, both in my experience with her at Glass Fabrics and Textura and our office's experience with her at a client she worked at previous to Glass Fabrics.

Q To the best of your knowledge, Mr. Zimmerman, did Textura have a practice of not recording expenses as they were billed?

MR. TOPKIS: Of not reporting expenses?

MR. BREINDEL: Recording expenses as they were billed?

A In general Textura recorded its expenses as they received the bills. There are times when bills would come in after the books were closed that pertained to a certain month. These naturally would be recorded in the next month. I would like to add that when we came in on a quarterly basis we searched the records for all unrecorded bills, and if we found any for our statement purposes accrued them.

Q During the time you prepared the financial state-

ments for Glass Fabrics and Textura did you review their unpaid bill files?

A Yes.

Q To your knowledge did Glass Fabrics or Textura ever pay J. P. Stevens within the time limit specified on J. P. Stevens' invoices?

MR. TOPKIS: Objection, your Honor. That is all matter of record, and I don't think we need to search the witness' memory on that.

THE COURT: Yes.

Q Mr. Zimmerman, were you ever a stockholder, director or officer of Textura, GLass Fabrics, or Fenestra?

A No, I was not.

Q Did you ever receive anything of value from J. P. Stevens?

A No.

Q Did you ever receive anything of value from Burlington?

A The only thing I can say is that our firm received of value from any of these people were references to new clients, if that is what you consider value. But, otherwise, I never received anything.

Q Is that also true of Clark-Schwebel?

A I have never received anything of value,

including references for a new client, from Clark-Schwebel.

Q Did any defendant in this case ever extend any credit to you?

A No.

MR. TOPKIS: Objection, and the fact that he didn't extend us credit makes no difference.

MR. BREINDEL: I am wondering why he is named as a co-conspirator if he never got anything.

THE COURT: I don't see much point in this.

Q Mr. Zimmerman, in 1964 did you benefit in any way from J. P. Stevens' extension of credit to Textura or Glass Fabrics?

A No.

Q Is that true for 1965 and 1966?

A That is true.

MR. COURT: Would it surprise you when I say it is not necessary for a co-conspirator to benefit?

MR. BREINDEL: It would not, but it would go to motive.

THE COURT: Why are we pursuing this?

MR. BREINDEL: An element of this is motive, and I want to show that Mr. Zimmerman has no motive to defraud these defendants.

THE COURT: Go ahead.

Q During the years 1964 and 1965 and 1966 did you benefit in any way from Burlington's extension of credit to Glass Fabrics or Texrura?

MR. TOPKIS: We don't contend he benefited in any way. I will make it easy

MR. BREINDEL: I have no further questions.

CROSS EXAMINATION

BY MR. TOPKIS:

Q Referring to this June 30, 1966 unaudited financial statement, Exhibit 47, have you got that in front of you, Mr. Zimmerman?

A Yes, I do.

Q Now, that statement is not an audited statement, is it?

A It's not an audited statement, no.

Q It's not a certified statement?

A No, it is not.

Q Your firm does not vouch for the accuracy of it except in so far as it accurately reports information which was given to you by your client Textura? Isn't that right?

A We do take certain steps in preparing interim statements.

Q But uou don't vouch for them?

A We are not able to give an opinion.

Q Exactly. And that is the difference between an audited and a certified statement and an unaudited one?

A That is correct.

Q Assuming that the books Textura showed as a matter of their internal records a whole lot of sales supposedly made in June of 1966 which actually were not made in June of 1966, and if you would prepare a document like this it would be wholly inaccurate? Isn't that right?

MR. BREINDEL: I object. Mr. Topkis objected to my questioning Mr. Zimmerman on how he went about preparing his statements. I think Mr. Topkis has made that subject irrelevant. If I can't go into it, I don't see why he can.

THE COURT: I think the situation is different.

MR. BREINDEL: On my direct with Mr. Zimmerman I went into the issue of how he went about preparing his financial statements. And if he relied on Textura's financial statements in doing so, and I was not permitted to do so. Mr. Topkis says it is irrelevant. So it continues to be irrelevant, it seems to me.

THE COURT: I will sustain the objection.

MR. TOPKIS: May I try again?

Q If the records of Textura falsely recorded sales made in June of 1966, when in truth and in fact no such sales had been made, you would not check that, would you, in the course of preparing a document like this, June 30, 1966, statement?

MR. BREINDEL: Same objection. We are covering the exact grounds that I attempted to.

THE COURT: You were going to ask him this question?

MR. BREINDEL: I was going to ask him how he went about preparing his year-end statements and quarterly statements and what documents he examined, and Mr. Topkis said it was irrelevant, and he is just rephrasing his last question to get to the same type of testimony.

MR. TOPKIS: He was asked and answered how he prepared documents,and I made no objections such as counsel is describing.

MR. BREINDEL: I will stipulate to stand by Mr. Topkis' objection on the record if he will.

THE COURT: You ask him what questions you want on the preparation of the books right now that you have not already asked.

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DIRECT EXAMINATION (Continued)

BY MR. BREINDEL:

Q Mr. Zimmerman, in preparing your year-end statements and your interim statements --

THE COURT: We are not talking about year-end statements. There was some question about his going into the details of preparing year-end statements and we could not see the relevance of it.

MR. TOPKIS: I said I didn't attack it.

THE COURT: Go ahead.

Q Mr. Zimmerman, will you tell us how you went about preparing uncertified, unaudited interm statements of Textura?

A Yes, we would go to the office of the client, we would be given a general ledger which had been posted by the bookkeeper. From that general leder we would take off a trial balance.

Q Will you tell the jury what a trial balance is?

A A trial balance is just a listing of all the accounts in the general ledger of all the assets, all the liabilities, all the income items and all the expense items, which has to balance to be right.

We would then do a bank reconciliation. We would check the factor statement. The company bought from

some few sources; most of these sources submitted monthly statements to the company. We would generally check the account payable balances on the books to those statements to make sure that everything had been recorded. We would check thed inventory cut-offs -- the physical inventory was taken each quarter -- to make sure that all bills were entered for items that were included in the inventory and that all items included in the inventory for which bills were entered.

We would generally check sales cut-off. As a matter of fact, in connection with that statement, there was one item which was recorded as a sale, and this was the item referred to before that I discussed with Mr. Berman. It was called the Del Webb job, which had a billing, I believe, in the area of $60,000. That was recorded as a sale, and we found it was not a sale. That has been eliminted from this statement also.

Q What is that statement, Mr. Zimmerman?

A Exhibit 47. In looking at the 1966 records the correction that should have been made to this statement instead of being dated as of June 30 it should have been dated as of July 8, because that is when the inventory was taken and the sales were held open until that point.

Q In connection with your preparation of unaudited,

uncertified financial statements for Textura did you rely on Textura's in-house statements?

A Never.

Q Do you know who prepared Textura's in-house statements?

A Their bookkeeper, Miss Irene Sharpe.

Q Were you ever asked to rely on those in-house statements in preparing your statements?

A No, generally we never even received copies of them. Occasionally we would, but we never relied on them for anything.

CROSS EXAMINATION (Continued)

BY MR. TOPKIS:

Q So the books and records of Textura recorded a sale to Del Webb of some $68,000 and you thought that was inappropriate so you didn't include it in the June 30 statement?

A Well, when you refer to I, you refer to the firm, Mr. Berman, yes.

Q So if you found recorded on the books and records of Textura sales which in truth and in fact had not taken place you would not include them in your quarterly statements?

A We would eliminate them, that is correct.

Q And you do your best to find any such?

A That is correct.

Q Now it's possible, you will agree with me I would imagine, Mr. Zimmerman, that you could overlook something? Is that correct

A Anything is possible, but if I may explain, before I explained that the company kept a total dollar control on its inventory.

I also explained that every sale that was recorded on the books was posted, and if there were a sale on the books, that had been posted out, in fact, was not a sale, the overall dollar inventory control would be reduced to that extent. We would know something was wrong when we were handed the physical inventory. Anything is possible. It's possible that we could have missed it, but there were controls that would enable us to find it.

Q That 17,000 or 18,000-dollar item that you referred to, the prepaid expenses, advertising expenses, do you remember that?

A Yes.

Q There had been entry as of December 31, 1965, for prepaid expenses Is that correct?

A Yes, there was.

Q Did you reduce that entry by $5000 in January of

1966 to reflect the payment by you?

A Yes, the receipt of that $5000 was posted against the prepaid expenses.

Q During the balance of the first six months of 1966 no other receipts came in? Is that right?

A Yes. I don't remember the exact date, but there was another receipt, I believe, either in March or April or May of that year for $1550 which was also credited to that account. I do not recall who it was from.

Q And those were the only receipts during the first six months of 1966 of which you were aware?

A That is true.

Q Was it represented to you by Mr. Powrie that he expected to get additional contributions from Various sources?

A Yes, it was.

Q So it wasn the basis of his representation to you that you kept this prepaid expense item as an asseet? Is that right?

A It was based on his representation to me the collection of in excess of $52,000 in 1965, the collection of the roughly $6550 in 1966 that led me to believe that the remainder would be collected.

Q The remaining $18,000?

A Yes.

I would like to point out that the balance at January 1st was $21,000, of which $6550 had been collected. Other items were added to the prepaid expense account, and I did look at those records and most of these items were also for this Engineer's Guide.

Q The June 30, 1966 report was never issued? Isn't that correct?

A I would assume that that is correct.

Q Well, you are quite sure of it, a ren't you?

A It was never typed. Now I that it was reviewed with Mr. Powrie. Whether Mr. Berman read these figures to any credit men or not I could not tell you.

Q But you never found any copy of it being issued?

A To the best of my knowledge it was never typed.

Q In your ordinary course you type a report before you wend it out?

A Generally, yes.

Q This entry on the books of Textura of $200,000 relating to the so-called Mo-Vac distributorship, you say you thought that was an appropriate entry?

A Yes.

Q You say that because you got or you were given by Mr. Powrie a letter from him to Clark-Schwebel dated February 23, 1965, Plaintiffs' Exhibit 870? That is the

document that was shown to you before?

A Yes.

Q You remember I asked you whether you were shown Exhibits I and A to that document and you testified you never saw them?

A That is correct

Q You see that this letter agreement between Mr. Powrie and Clark-Schwebel says, from Mr. Powrie to Clark-Schwebel:

"You shall pay to us the sum of $50,000 when an agreement in the form of Exhibit I has been signed by you, that is, Clark-Schwebel, Textura, Limited, and Mo-Vac International, Inc."

Do you see that language?

A Yes, I do.

Q This $50,000 was never paid, was it?

A No, it was not.

Q And to your knowledge no agreement in the form of Exhibit I was ever signed by Clark-Schwebel?

A No to my knowledge, no.

Q Nor was it signed by Textura to your knowledge?

A To my knowledge, no.

Q You have never seen such a document?

A That is correct.

Q The document continues:

"You will pay us $50,000 when the price schedule referred to in Paragraph 4 of the contract has been agreed to in writing by the said parties and attached to the contract as Exhibit A."

Now, to your knowledge that price schedule was never agreed to in writing by anybody, was it?

A To my knowledge, no.

Q And it was never attached to any contract as Exhibit A, to your knowledge?

A To my knowledge, no.

Q You see in Subparagraph B that it provies that:

"If Mo-Vac fails to give you -- that is, Clark-Schwebel -- the notice referred to in Paragraph 1-A of the contract within one year afrer the date of this agreement we shall upon demand repay you the amount given to us pursuant to Subparagraph A."

That is the $50,000 that was never given? Is that right?

A That is right.

Q And Mo-Vac did fail to give the notice referred to in Paragraph 1-A, didn't it?

You don't know of Mo-Vac ever giving any such notice?

A I don't know of Mo-Vac giving notice.

Q And you tell us that you once saw a letter from Clark-Schwebel to Mr. Powrie offering him a hundred thousand dollars for a half interest in this?

A That is true?

Q Are you sure of that?

A I am positive of that.

Q Do you remember what the letter said?

A I can't recall everything the letter said, but it discussed the Mo-Vac process, it discussed the need of that type of goods in the industry, and there was a paragraph offering a hundred thousand dollars for a one-half interest.

Q Do you remember whether that letter was shown to you at the same time that Plantiffs's Exhibit 870 was shown to you?

A No, this letter was shown to me earlier, much earlier, in 1964, the letter that you referred to offering the hundred thousand dollars.

Q Ot was shown to you much earlier in 1964?

A Right.

Q You are sure you saw it?

A Yes.

Q Is your confidence in the slightest degree

shaken by the fact that Mr. Powrie has not been able to come up with the letter and Clark-Schwebel has no record of any such letter?

MR. BREINDEL: Objection. There has been no evidence that Clark-Schwebel has no letter.

THE COURT: Strike that.

Q Is your confidence shaken by the fact that Mr. Powrie has not produced any such letter here?

A No, it is not.

Q You are still certain?

A I saw that letter.

Q On the basis of that letter you thought it appropriate to value this distributorship at $200,000?

A On the basis of that letter, on the basis of this agreement which showed that the Mo-Vac process did have a value, on the basis of the agreement that Mr. Powrie signed giving him the distributorship of this process, and on the basis of the minutes in which Mr. Powrie's associates agreed that there was a value to this.

Q Do you know what Mr. Powrie paid for this distributorship?

A I don't believe Mr. Powrie paid for this distributorship.

Q Do you know one way or the other?

A I do not know positively.

Q If in truth and in fact he paid zero for it, would that affect your judgment as to its value?

A No, I don't believe it would.

Q As of December 28, 1964, you are referring to the minutes of a special meeting of the board of directors of Textura as giving you some clue as to the value of the Mo-Vac process?

A That is correct.

Q Those minutes refer to a value of a hundred and fifty thousand dollars, don't they?

A That is correct.

Q Not 200,000?

A That is correct.

Q Was it your feeling generally, Mr. Zimmerman, that if the stockholders of this company wanted to say it was worth $200,000 they probably knew more about it than you did and unless you had some real reason to challenge it, it was perfectly all right for you to report it on the books at 200?

MR. BREINDEL: Objection.

THE COURT: I think he has described on what basis he reached the determination. I will sustain the objection.

Q Mr. Zimmerman, did it ever occur to you that possibly this Mo-Vac distributorship was not worth $200,000?

A Yes, it did.

Q When did that thought come to you first?

A After these processes started. I am talking about this suit.

Q This lawsuit was begun in December of 1966, sir. Is that what you mean?

A I wasn't really aware of it until some time in 1967.

Q I see. Well, you knew in 1966 that the Mo-Vac process had not entered commercial production, didn't you?

A I knew that at that point it had not.

Q And you knew that Clark-Schwebel had not paid any $50,000 under this letter agreement of PX-370, didn't you?

A That's correct.

Let me amend that. I now know that is correct. I knew it was correct up through the time of the point I did the March 31, 1966 unaudited statement.

MR. TOPKIS: Could I have that answer back,

please.

(Record read.)

Q When you did the March 31, 1966 unaudited statement, sir, didn't you inquire whether Mo-Vac had given the notice referred to in the letter of February 23, 1965?

A I do not recall inquiring.

Q Is it possible that that just slipped your attention?

A It's possible.

Q Your deposition was taken in this action on two occasions, wasn't it, Mr. Zimmerman?

A That is correct.

Q Do you recall, sir, that on neither of those occasions you mentioned this letter from Clark-Schwebel supposedly offering $100,000 for a half interest in a Mo-Vac distributorship?

A I believe that I did. I also would like to point out that in the first deposition I gave, which was some time in October of 1970, that as the deposition will show I was under a tremendous strain in that my wife was dying --

Q I am sorry to hear that.

A -- and I pointed that out in the deposi-

tion, and even though I read it afterwards and I didn't find any corrections, I do believe that I had mentioned it.

Q I don't think it is there, but if it is I am sure zealous counsel will find it and call it to our attention.

MR. BREINDEL: Your Honor, if Mr. Topkis asserts it is not there, we will stipulate to it.

MR. TOPKIS: Nor is it, to the best of my understanding, in the deposition of October 29, 1973.

MR. BREINDEL: The same stipulation, your Honor.

THE WITNESS: May I ask, was I asked the question?

MR. TOPKIS: I think that questions were asked which would have called for identification of that document.

BY MR. TOPKIS:

Q At what point, sir, do you think it would have been appropriate to take that $200,000 Mo-Vac entry off the Textura books as an asset?

A I would have to give that considerable thought and review it with people in my office who were responsible for decisions affecting the latest

accounting procedures. My quick opinion would be that, for instance, if I found in 1965, or I found in 1966, that it had no value, that I might go back and amend the 1964 audited statement.

Q Did you find anything in 1965 or 1966 which indicated to you that the Mo-Vac processed had any value?

A No, but as well I did not find anything to show me that the Mo-Vac process had no value. I knew that they were in the process of building a plant. I knew that they were in the process of developing the fabric. I knew from clients in the curtain and drapery industry that a fabric of that type was necessary. I also know from clients who have developed various fabrics that it takes time to do it. But I had no occasion whatsoever during my association through the point I mentioned that the process had no value.

Q Do you know whether Mr. Powrie ever told anyone that the process was a total failure and worthless?

A I do not know that, no.

Q He never told you?

A He had never said that to me.

Q He never told you that?

A Not at that point, no.

Q When did he

A I think we were discussing it within the last six months, and he mentioned that they never really, to this day, have gotten it off the ground.

Q Now, this good will item on the Textura balance sheet, that $50,000-odd, do you remember that?

A Yes, I do.

Q That is nothing that anybody could sell or eat or use, is it?

A No, it is not.

Q And, as a matter of fact, it was just the end product of some arithmetic, wasn't it? That is, you saw that Glass Fabrics' liabilities, its debts, what it owed, were more than what it had, and so when Textura took it, in order to make Textura's books balance you had to credit something to the asset side and so you called it good will, is that right?

A That is correct.

I also point out that during this period of time accounting principles had no provision whatsoever of writing off good will. As a matter of fact, they had no provision at that time for writing off research and development.

Since that date there have been changes in

that good will now must be written off over a period of time, as well as development costs, but this is within the last three, four, five years, that this has taken place.

In the past when a figure of good will was placed on the books it remained.

Q And its placement on the books was within the discretion of the accountants?

A Normally, I would say yes.

Q Was there any other way that the $50,000-odd difference between Glass Fabrics' assets and its liabilities could have been handled as an accounting matter?

A I can't give you a quick answer to that. I have not given it thought.

Q You are not certain that there was some other way?

A I am not certain that there was another way.

MR. TOPKIS: I have nothing further.

Thank you, Mr. Zimmerman.

CROSS EXAMINATION

BY MR. MC GANNEY:

Q Mr. Zimmerman, you had no involvement with

this account after March 31, 1966, isn't that correct?

A From March 31st -- at the time I did the March 31st audit my basic involvement, my only involvement, to the end of the business was reviewing with Mr. Berman the account before he went into doing it, looking at his finished product, and during the process of preparing that, discussing that Del Webb job with him.

Q You didn't examine the books and records of Textura as of June 30, 1966?

A Not at that time. I have since.

Q And when did you do that, sir?

A I would say within the last six months.

Q In preparation for coming here to testify?

A That is correct.

Q Mr. Zimmerman, when you prepared the December 31, 1965 statement -- first, let me ask you, that December 31, 1965 statement, that includes Fenestra's operations through the year 1965 as well as Textura's, is that correct?

A I would have to have that statement -- here it is. The statement that I have in front of me is for Textura only.

Q Did you prepare a statement for Fenestra?

A To the best of my knowledge, no.

Q Do you know whether Fenestra's sales were recorded in Textura at the year end 1965?

A As I recall, in 1964 Fenestra basically became inactive.

Q So Fenestra was not operating in 1965 and 1966?

A That is how I recall it.

Q Fenestra never had any economic substance at all, did it, Mr. Zimmerman?

A The basic reason for Fenestra's existence was to handle certain large jobs, billing them under some name other than Glass Fabrics. This is the reason that was given to me for the existence of Fenestra.

Q It is true, sir, that it had no economic substance, is that correct?

A Not basically, no.

Q I notice on the December 31, 1965 balance sheet, under the category "Other Assets," a statement: "Due from Fenestra Fabrics, Inc., $11,000."

Do you know how that entry came to be made?

A That entry would have been a carryover from when Fenestra was active. We would have been trans-

ferred as one of the assets of Glass Fabrics when Textura acquired all the assets and liabilities of Glass Fabrics.

Q Do you have the sales ledgers in front of you?

A I do not have them in front of me, no.

MR. MC GANNEY: Do you have them, Mr. Breindel?

MR. BREINDEL: They are in the courtroom, and if you wish the witness to go through them, he will.

MR. MC GANNEY: If you could provide him with the sales ledgers of 1965 and 1966 of Fenestra --

MR. BREINDEL: I wouldn't know what they look like. I would be glad to otherwise.

I would suggest you give me all the ledgers you want and we will take a short recess and Mr. Zimmerman will get them for you.

THE COURT: All right, we will take a short recess.

(Recess.)

(In open court; jury present.)

BY MR. MC GANNEY:

Q During the recess you refreshed your recollection that Fenestra was in fact in oepration in 1965 and 1966?

A Yes. I was wrong on that point.

Q Does your December 31, 1965 statement include Fenestra's operations as well?

A It does, yes.

Q Fenestra was merely a name in which Textura did business?

A May I explain how it is included? As I explained before, Fenestra was basically a name in which to bill certain customers. It was explained to me by Mr. Powrie that certain mills were getting objections because Mr. Powrie was doing certain type of large jobs, so instead of using Glass Fabrics he used the name Fenestra. The sales that went through Fenestra actually transferred to Textura and are reflected on Textura's books as sales, and all the costs of those sales are on Textura's books.

Q I was asking you when we broke about the item on the balance sheet which says due from Fenestra Fabrics $11,000-some-odd. Can you tell me how that item arose?

A Yes. As I pointed out to you, that at January 31, 1965 there was a balance of 13-odd thousand dollars, and during the year these sales were recorded on Fenestra but transferred to Textura so that even the amount was reduced because certain collections on Fenestra were transferred to Textura.

There were no transactions on that account at all during 1966.

Q So that this item on the balance sheet remained the same on your March 31, 1966 statement?

A Yes. It's identical.

MR. BREINDEL: What exhibit number is that?

MR. MC GANNEY: Exhibit 39.

MR. BREINDEL: Thank you.

Q This also appeared on the June 30, 1966 statement, is that correct?

A I happen to be looking at the June 30th.

MR. BREINDEL: Could the witness see it?

Q Plaintiffs' Exhibit 39 is the last statement that you prepared, is that correct?

A That I was involved in the preparation of, yes, and the amount due from Fenestra Fabrics is identical, $11,349.

Q Do you know whether that amount was ever

paid, Mr. Zimmerman?

A I don't know.

Q You do know in August of 1966 the Mo-Vac item on the balance sheet was completely written off?

A I have been told that that item was written off, but I had no knowledge of it at the time that it was written off.

Q Neither Mr. Powri[illegible]nor Miss Sharpe consulted with you on that?

A Nobody consulted with me on that.

Q And that was after Mr. Berman's report was prepared, is that correct?

A (No response.)

MR. MC GANNEY: I withdraw the question.

Q And you do know that the item of good will was written off in August of 1966?

A I have been informed that it had been written off, but at the time it was written off I had no knowledge of it.

Q I have provided you, Mr. Zimmerman, with a copy of the sales journals of Fenestra Fabrics.

Can you tell me when you performed your year-end audit, December 31, 1965, whether there were included in the December sales any sales that were actually

invoiced in January, 1966?

A I have checked since that date and the cut-off, to the best of my knowledge, at December, 1965 was cut off on December 31, 1965.

Q So there are no sales in the year 1965 that were invoiced in 1966?

A I don't understand that question.

Q There are no sales included in your report for the year 1965 that were actually invoiced in the year 1966?

A To the best of my knowledge, no.

Q Turning to the June 30, 1966 date, have you examined the sales journals of Textura and Fenestra for the end of June, 1966?

A Yes. Within the last six months I have.

Q You dod not do that in 1966?

A No, I did not.

Q Can you tell us whether there are any sales included in the June 30th half-year statements that were actually invoiced in July?

A Are you talking about other than the Del Webb?

Q Well, there is the Del Webb job.

A Yes, chere is a Del Webb billing in excess

of $60,000, which I have testified has been eliminated from this statement.

Q Are there other --

A I also testified before that the change I would make in this statement I would not have it as of June 30th but I would have it as of July 8th.

Q This is in this draft statement that was prepared?

A Yes.

MR. BREINDEL: Could we identify that as Plaintiffs' Exhibit 47.

Q That is Exhibit 47?

A That is what I am referring to, yes. I believe I did testify earlier that I would have made that change if I were doing it, to call it as at July 8th, because I believe there was approximately $15,000 worth of sales included in the figures through July 8th.

I also believe that the inventory was taken at July 8th as well, and the purchases were entered up through July 8th as well.

THE COURT: This would be in addition to the Del Webb item?

THE WITNESS: This is in addition to the

Del Webb item, yes.

BY MR. MC GANNEY:

Q Had any of your previous reports ever been issued as at any date other than the end of June? Did you ever issue a July 8th report before?

A On this particular client?

Q Yes, Mr. Zimmerman.

A No. I have on others.

Q As it stands now Plainriffs' Exhibit 47 dated at June 30 is an incorrect statement of the sales as of June 30, 1966? Isn't that correct?

A It is a funny question. If this statement were dated July 8, at which time --

Q It is not dated July 8?

A I said I would make that change in it because the actual cutoff completely of inventory purchases and all else was as of July 8.

Q But the statement that had been admitted in evidence is dated June 30, 1966?

A That is right. It's an incorrect statement of the sales as of June 30.

THE COURT: I think you have covered that. We are getting into semantics now. At any rate, it's repetitious.

Q Have you examined the books and records of Textura and Fenestra as of June 30, 1966? What I mean to ask you is, have you looked at the July sales?

A I looked at all the records since 1966, yes.

Q You looked at the July, 1966, sales?

A Yes, I recall looking at them.

Q Do you recall whether there is recorded in July, 1966, sales that were actually invoiced in August?

A I do not recall that. My primary interest in looking at those records were through June of 1966, but I did see the entire set of books.

MR. McGANNEY: I have no further questions.

CROSS EXAMINATION

BY MR. HARDISON:

Q You testified on direct examination with respect to conversations you had with credit men generally and Mr. Donnelly of Burlington Industries specifically? Is that correct?

A That is correct.

Q I believe you testified that credit people were primarily interested in determining the ability of your clients, including Textura, to pay the bills?

A That is correct.

Q I think you said that some of the things they look for in that connection is working capital? Would that be one?

A I put it in a different way. I said what they are primarily interesred in is current assets and current liabilities, the difference of that figure being working capital. I also said that they were interested in subsequent events as to what sales in the future had been and what bookings had been.

Q Did you characterize bookings as open orders?

A Open contracts, right.

Q Didn't you say they would be interested in any unusual circumstances?

A That is correct.

Q Would you include within that category of unusual circumstances any arbitration proceeding that might have been brought against the client?

A Yes.

Q Would you include a history of slow payment of bills by the client?

A Well, sir --

Q Can you answer the question yes or not?

A Repeat the question.

Q Would you include within the category you just described, a history of slow payments of bills by the client.

A Those people that would normally be calling me would already know that fact.

Q Then you would include it?

A No, I would not include it unless it was a completely new source.

Q Would you include in the category the fact that a supplier to the client might have requested a personal guarantee in connection with the accounts?

MR. BREINDEL: Objection.

THE COURT: What is the objection?

MR. BREINDEL: I don't know what "might have" means.

THE COURT: If such a demand had been made, would that be a matter that he wouldd consider unusual or significant?

THE WITNESS: May I first state that in this industry a personal guarantee is not unusual, but if I were asked if that client, any particular client, had given personal guarantees that I was personally aware of, I would answer the question.

Q Would you include among that category of unusual situation the discharge of employees by your client?

A No, I don't think that is unusual.

Q Do you know whether at about the end of 1965 Textura, in fact, discharged a number of its employees?

A No, I do not.

MR. HARDISON: That is all, your Honor.

MR. BREINDEL: A few questions on redirect, your Honor.

REDIRECT EXAMINATION

BY MR. BREINDEL:

Q Does Plaintiffs' Exhibit 47, your firm's June 30,

1966, statement, include any income whatsoever from the Del Webb job?

A No, it does not.

Q I believe you testified, Mr. Zimmerman, that there is certain income included in Plaintiffs' Exhibit 47 which was received after June 30, 1966?

A What I stated is that the books of the company were kept open till July 8 of 1966. My understanding is that the inventory was taken as of July 8, 1966, and that all purchases through July 8 afffecting the inventory were either accrued by Mr. Berman or placed on the books. What I am trying to say that if this statement were dated July 8 than interim unaudited statment it would be correct.

Q Is there any income included in the June 30, 1966, statement which was Received after June 30, 1966?

A Yes, there were invoices through July 8 included.

Q Does the failure to include that income in Plaintiffs' Exhibit 47 significantly affect the accuracy of Plaintiffs' Exhibit 47?

A Well, in checking later I found there was approximately $15,000 of invoices that were included as of June 30, but in investigating it I found that the costs were also included.

Q Approximately how much were those costs?

A The gross profit aas approximately 30 to 33 per cent, so the cost would be the difference.

Q Does the fact that the difference is incluced in Plaintiffs' Exhibit 47 even though it was received after June 30, 1966, significantly affect the accuracy of Plaintiffs' Exhibit 47?

A I do not believe so.

RECROSS EXAMINATION

BY MR. TOPKIS:

Q Really, then, what you're saying is that this draft statement, Exhibit 47, is a statement not for a quarter of a year, but for a quarter of a year plus a week?

A Yes. I also want to point out that it is not at all unusual in this industry.

Q I'm not suggesting that. But in the prior year, 1965, your statement as of June 30 was a statement of June 30, wasn't it?

A To the best of my knowledge, yes.

Q So you couldn't compare the 1966 figures with the 1965 figures? We are comparing 14 weeks and 13 weeks?

A Put it that way, yes.

MR. TOPKIS: That is all.

THE COURT: You are excused.

(Witness excused.)

MR. BREINDEL: I believe we are waiting for Mr. Schwebel, who is to be here at 2 o'clock for the resumption o f his cross.

THE COURT: We will adjourn till 2 o'clock.

All right.

(Luncheon recess.)

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AFTERNOON SESSION

(2.00 p.m.)

(Jury present.)

MR. TOPKIS: If your Honor pleases, by agreement of counsel we will now resume with Mr. Schwebel's testimony if that is satisfactory to your Honor.

THE COURT: Yes, that is satisfactory.

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J A C K P. S C H W E B E L , previously sworn, resumed and testified further as follows:

THE CLERK: You are still under oath, sir.

CROSS EXAMINATION (Continued)

BY MR. TOPKIS:

Q Mr. Schwebel, there has been testimony here that Textura and Glass Fabrics or Fenstra, whatever name under which the business was done, specialized in selling curtains to architects and builders of large commercial structures.

The question I would like to put to you, sir, is is that way of doing business unusual in your experience or are there other companies, specifically were there other companies in the early and middle 1960's which were engaged in that business?

A To the best of my knowledge, Mr. Topkis, of the decorative fabric business and its marketing and distribution there were and are at least several other companies such as Thortel, Firepoof Products, Roscoe, a firm in Chicago by the name of Benrose, who pretty much engaged in the same distribution of fabrics for primarly the architectural field; high-rise builings and the institutional field.

Q You say their distribution of fabrics. Would that include within it the construction or selling and preparation and selling of curtains and drpaeries?

A Yes, they either manufacture and install such drapes, I believe, or they in some cases perhaps subcontract the actual sewing of them but will take in their own names the architectural contracts from the institutions or bank or government building, whatever the case may be.

Q There came a time in your dealings with Textural, Mr. Powrie's company, whatever its name, when Clark-Schwebel put Textura on a C.O.D. basis.

Do you remember that?

A Yes, I do, very well.

Q Could you tell us, sir, how that came about?

A We received a letter from Mr. Powrie in which he stated that as a result of our inability to resolve the alleged quality claims that he was making, that he had taken

the matter up with his attorneys. This was the first time that we had ever had any reference to legal action or lawyers in this matter and that rather disturbed me.

Secondly, in that same letter, I believe, Mr. Tppkos, he said that he was, in our judgment, arbitrarily taking a $30,000 deduction from his indebtedness and payment to us.

Mr. Nordheim and I talked the matter over and we concluded that since he apparently had made the decision to halt what we had hoped would remain reasonable discussions between our companies and had gone to an attorney on the matter, and since he was intending to make a deduction that none of us had agreed to accept , that we had to take restrictive action in limiting our further exposure of open credit and at that point we notified Mr. Powrie that further shipments until the matter was resolved one way or the other, would be on a C.O.D. basis.

Q Were you willing to go on selling to him provided he paid cash?

A Yes, definitely. We had a great deal of merchandise in stock that we were very anxious to sell to him.

Q Was that merchandise readily salable to anyone else?

Thank you.

CROSS EXAMINATION

BY MR. MC GANNEY:

Q Mr. Schwebel, I would like to ask you some questions to set our time period, after the formation of the Clark-Schwebel Fiber Glass Corporation.

Did there come a time you established a decorative division at Clark-Schwebel?

A Yes, sir, in early 1962.

Q Did you employ someone to run that division?

A Ray Nordheim.

Q Is there another division at Clark-Schwebel?

A Yes, sir, an industrial glass fabrics division.

Q How long had that been in existence?

A Substantially, that represented the entire company until we formed the Decorative Division, and ther we gave formal name to the majority of the business, which was the Industrial Fiber Glass Division, so you might say it was christened in 1962, also.

Q Was there an individual who held a comparable position in the Industrial Division to Mr. Nordheim?

Q Did you negotiate any contracts with decorative customers, Mr. Schwebel?

A No, sir, I did not.

Q Did you participate in the sales of decorative fabrics by Clark-Schwebel?

A On very rare occasions, perhaps one in a year Mr. Nordheim would ask me as a matterof good public relations to have a social luncheon with a decorative customer.

But these were not really in the form of hard business discussions and negotiations but, as I indicated, just public relations meetings.

Q Did Clark-Schwebel have a credit department?

A No, we didn't.

Q How would Clark-Schwebel go about gathering credit information?

A Well, in so far as the decorative division was concerned, Mr. Nordheim would obtain a Dun & Bradstreet report if such was available on a particular company.

He would ask the account in question to send us a financial statement for our confidential information. He would ask the account to give him the names of other companies with whom they were an important customer and we would call those other companies and find out what their

credit experience was.

Mr. Nordheim would obtain the name of the account's bank and we would call the bank and find out if the bank had a satisfactory, normal credit relationship; whether they extended any loans; what their educated judgment was as to the financial viability of the company and much the same thing would be done in the industrial division.

Q Mr. Schwebel, we discussed I think at some length yesterday the determination of costs and prices.

If it came to your attention that Clark-Schwebel prices on industrial fabrics either should be raised or lowered because of market conditions, how would you go about accomplishing that?

MR. BREINDEL: Objection, your Honor.

THE COURT: I think he testified as to how they came to their prices. He testified yesterday what factors he took into consideration.

MR. BREINDEL: The question was a purely hypothetical speculative one, if it came to your attention how would you do it. I think it is objectionable on that ground.

THE COURT: I will sustain the objection.

He has given the basis on which he did it.

THE COURT: I hope we don't repeat what we did yesterday.

MR. McGANNEY: I don't think it was precisely gone into yesterday.

THE COURT: I recall that testimony that there is no price list comparable.

MR. McGANEY: Just one more question on this subject if I may.

Q Mr. Schwebel, do you know if a price change in decorative fabrics were called for, how would that be accomplished?

MR. BREINDEL: Objection, your Honor.

THE COURT: Overruled.

A It would be accomplished by the only procedure available to us at the time and that was to negotiate a new price the next time that specific customer came in with a request to buy an additional quanity of a particular fabric desiged for him.

Q Mr. Schwebel, let me hand you Exhibit AI, a fiber glass industrial price list.

I notice various style numbers. My question is:

Are those style numbers common to the industry?

A Yes, sir, they are uniformly used in Government

specifications and commercial specifications and some military specifications and generally by the fiber glass weaving industry as a result of their origin in these ASTM standards and Government specifications.

Q Mr. Schwebel, do you know whether Owens-Corning has separate industrial and decorative departments?

A Yes, they do.

Q Do you know whether PPG has separate industrial and decorative departments?

A Yes, they do.

Q I would like to show you Defendants' Exhibits in evidence AA and AB and ask you if you can identify those?

A Yes, sir.

Each of these are credit memos issued by Clark-Schwebel Fiber Glass in February 1965 to Glass Fabrics, Inc., Mr. Powrie's company, for $2500.

The purpose of the total $5000 credit was a subsidiary or a promotional allowance that we issued to Mr. Powrie to assist him in the costs of publishing a brochure which promoted decorative fabrics for window treatment in the architectural and institutional field.

Q Is this the brochure, Plaintiffs'

the industrial division?

A That would be John Wilson.

Q Mr. Wilson?

A Yes.

Q Did you have any contact with Mr. Wilson during that time?

A Well, he was an employee of the company but no special contact other than that.

Q But you knew Mr. Wilson?

A Yes.

Q When did this responsibility in the industrial area terminate, if it terminated?

A In 1968.

Q You are not involved in the industrial fiber glass area at the present time?

A No.

Q How long have you known Mr. Jack Schwebel?

A I have known Mr. Schwebel since 1946 or 1947.

Q Has your association with him been primarily in the area of business?

A Yes.

Q Were you with him when he formed the J. P. Schwebel Company?

A Not at the time it was formed but shortly there-

after.

Q He asked you to join the company?

A Yes.

Q When he sold this company to J. P. Stevens, did he ask you to come along?

A Yes.

Q Did there come a time when Mr. Schwebel left J. P. Stevens?

A Yes, sir.

Q When was that?

A I think it was 1960.

Q Where did he go, Mr. Schwebel, that is?

A I think he helped form Clark-Schwebel Corporation -- Schwebel Fiber Glass Corporation.

Q Did he ask you to join him in the Clark-Schwebel Company?

A No.

Q When M.r Schwebel left you assumed the position Mr. Schwebel had previously held?

A Yes, sir.

Q Was that an increase in the area of your responsibility?

A Well, I became department manager instead of assistant department manager so I would say yes.

Q For the period from 1956 to 1960 while Mr. Schwebel was still at Stevens, did you report to anyone other than Mr. Schwebel?

A No, sir.

Q Who reported to you for that period of time at Stevens?

A Well, at that time as I said I assisted Mr. Schwebel the manager of the department and I don't think you would say anyone reported to me per se. They reported to Mr. Schwebel and I assisted him in his duties.

Q Who are some of these people that reported to Mr. Schwebel in addition to yourself?

A In the main I would say our salesmen.

Q Any of these salesmen follow Mr. Schwebel to Clark-Schwebel Company?

A A Mr. DiNapoli, Jack DiNapoli left some time after Mr. Schwebel did.

Q To join Clark-Schwebel Fiber Glass Corporation?

A Yes.

Q Is that the only one?

A I can't think of any other salesmen. I don't believe there were any other salesmen to join Clark-Schwebel.

Q Can you describe the synthetic fabrics division

of J. P. Stevens?

A At what time? When was this?

Q The period 1956 to 1966 and I will try to confine my questions to that time period, Mr. Gusman.

A During that period the synthetics division of J. P. Stevens was responsible, in fact had two functions, of manufacturing and marketing in the main the synthetic fabric products by the company.

Q Did that include industrial fiber glass fabrics?

A Yes, it did. The industrial fiber glass fabrics is a department in that division.

Q Did this also include the decorative fiber glass fabrics?

A Yes.

Q Is that division or department of synthetic fabric division the division that Mr. Wilson was in charge of?

A Yes.

Q Mr. Gusman, did there come a time when you became aware of the existence of a price fixing agreement or understanding in the fiber glass industry?

MR. TOPKIS: If your Honor please, wasn't this all gone into yesterday, with Mr. Schwebel at some length? Do we have to have it again?

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for examination on Wednesday, and he also was a grand jury witness, for the purpose of our own scheduling.

THE COURT: All right, I will take a look at his. I left all of those upstairs, except the ones I have here, that dealt with whoever these people were -- Duff and Hankin and O'Connor. O'Connor I haven't read, but, frankly, these I have read.

(Recess.)

(In open court; jury present.)

BY MR. ATLAS:

Q Mr. Gusman, to the best of your recollection, can you describe for us the terms of this price-fixing understanding or arrangement that was arrived at among the competitors in the fiber glass industry?

MR. TOPKIS: If your Honor please, we have had all this ad nauseam. I said it in my opening, we have said it over and over again, that is not an issue in this case.

MR. ATLAS: I dispute that, as I have indicated to you before, and as I have indicated to Mr. Topkis.

MR. TOPKIS: I don't know how counsel can dispute it.

Industrial Glass Division?

A 1955 to 1968.

Q And during all of that time did Stevens have an Industrial Glass Division and a Decorative Division.

A Yes, sir.

Q And you were all of that time in the Industrial Glass Division?

A Yes, sir.

Q Did you have anything at all to do with the Decorative Glass Division?

A No, nothing whatsoever.

Q You have testified that you attended various price-fixing meetings in connection with industrial glass. When was the last of those?

A I believe it was, to the best of my recollection, in mid- or late 1962.

Q How did these price-fixing arrangements come to an end, if they did, Mr. Gusman?

A Well, I, as department manager of the industrial flass fabrics department, felt that it was in our longterm best interests to stop this practice and price completely independently, and we did start to price completely independently in, it was either

late '62 or early '63.

Q Did you do that by issuing a new price list or in some other fashion.

A We issued new price lists, we issued notices to customers giving them discounts from current price lists, and, again, operated independent pricing.

Q So that the price-fixing arrangements were at an end by early 1963?

A Yes, sir.

MR. TOPKIS: No further questions, your Honor.

Thank you, Mr. Gusman.

MR. MC GANNEY: No questions.

MR. HARDISON: No questions.

THE COURT: You are excused.

(Witness excused.)

MR. BREINDEL: Your Honor, for our next witness we would like to call John Bruner.

Witness John Bruner

JOHN BRUNER, called as a witness by plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BLUMENDEL:

Q Mr. Bruner, what's your occupation?

A I am an associate professor of business economics in the Graduate School of Business, University of Southern California.

Q What subjects do you teach, Professor?

A I teach a variety of subjects but primarily what is called microeconomics, macroeconomics and managerial economics. In addition to that, I teach corporate finance, and taught those at the graduate level and the first three at the doctorate level.

Q Tell the jury briefly what microeconomics, macroeconomics and managerial economics are about?

A Microeconomics addresses itself to issues concerning the firm and the consumer, and macroeconomics, macroeconomics, as such, addresses itself to issues concerning the entire economy. For example, the problem of total employment or total output or total price levels, and the like.

Managerial economics, on the other hand,

addresses problems from a business perspective and attempts to apply this theoretical base that we developed in micro- and macroeconomics, and corporate finance is very traditionally the financial function of the firm.

Q Where did you do your undergraduate work?

A At the University of Arizona.

Q Where did you do your postgraduate work?

A My graduate work was at Arizona State University ahd the University of Colorado.

Q Do you have any graduate degrees?

A Yes, I do.

Q What are those?

A I have a Master of Science degree, I have an M.B.A., Master of Business Administration degree, and I have a D.B.A., which is a Doctor of Business Administration.

Q Do you belong to any professional associations?

A Yes, sir.

Q Which ones?

A The American Economic Association, which is the General Economic Society.

Q Have you ever received any research grants?

A Yes, sir.

Q And what are those?

A I have received a variety of research grants. One from the Department of Interior, Office of Water Resources Research, to study the demand for municipal water in Central Airzona, which is my dissertation.

I received a grant from the Office of Economic Opportunity to study the feasibility of establishing a cooperative marketing center in the Watts area of Southern California.

I received a research grant from the United States Department of Commerce, the National Oceanic and Atmospheric Administration. As a matter of fact, I received two such grants from them. The latter is in progress at the present time. My charge there is to estimate or forecast the demand for and supply of sand and gravel in the Los Angeles -- I beg your pardon -- in the coastal zone of California.

Q Have you ever been employed as a business consultant?

A Yes, I have.

Q By whom?

A By a variety of firms, to include United States Postal Service, North American Van Lines, Lowell

Scutter Division of Pet Foods, Lockheed Aircraft, Automobile Club of Southern California, Charter Diversified Services.

Q Briefly, what did you do for the United States Postal Service?

A For the United States Postal Service I attempted to forecast the sales for Alden's, Inc. Alden's, Inc. is a wholly owned subsidiary of Gamble-Skagmore, Inc. And Alden's is in the mail-order business. For the Postal Service that was the tie-in. They were interested in what went through the United States mails and were interested in that as an industry.

Q What did you do for North American Van Lines?

A I worked with approximately 200 of their agents. North American Van Lines is a controlling interest, it is held by Pepsico, and I worked with approximately 200 of their agents in a marketing program and instructed them, at least in part, in methods of forecasting their sales.

Q Can you tell us what you did for Charter Diversified Services?

A That's an investment counseling firm in Los Angeles. They manage approximately two to three

hundred million in assets. I have made economic forecasts at the macro level, the national level for them, on a quarterly basis for about three and a half years.

Q Have you done any work for plaintiffs in connection with this lawsuit?

A Yes, sir.

Q What were you asked to do on behalf of plaintiffs?

A I was asked to project the sales for Textra, Inc., had they remained in business for the period 1967 through 1976.

Q Were you told what the purpose of your report was?

A Yes, sir.

Q And what were you told?

A The purpose of the report was to provide a sales estimate, a sales forecast, from which the profitability or loss of that enterprise could be reasonably determined.

Q Does your report itself refer to profits or losses?

A No, sir.

Q Can you tell us, is economic or business forecasting an art or a science?

I think it is a reasonable predictor, that Textura's sales should vary directly with this as an industry.

Q In making your report, Professor Bruner, did you do a study of the various proxies that you could use to make these predictions?

A That's correct.

Q What proxies did you consider using?

A Well, I considered using a whole variety of proxies, and in the early report I did use several. One pertained to the construction industry as such. Since Textura supplied its products and services to various market segments, to various types of customers, to include commercial high-rise buildings -- that was the tie-in with this construction industry -- to schools or educational facilities, to hospitals, and the like, I used measures of the growth in hospital construction, educational construction and in a commercial high-rise component.

Since they sold through decorator outlets, sales for resale, we used a measure for decorator sales formerly which was disposable personal income, which was a measure of the capacity at the retail level of the consumer.

So we used a variety of proxies here for

the industry as such, the industry within which Textura operated and sold its products.

Q In making your final report did you determine that SIC 2591 was a more accurate proxy than relying on non-residential construction?

A I think SIC 2591, this drapery hardware, blinds and shares, since drapery hardware was sold by Textura, blinds and shades are in fact substitute products, particularly in the commercial level, and particularly because this particular time series, these data, are government data, they are objective data, they are determined by a census and sampling procedures, I felt that that was a more accurate predictor or would be more closely associated with and therefore a more accurate predictor of the sales of Textura.

Q Is it your opinion, professor, that SIC 2591 is the most accurate proxy that you could find for projecting sales?

A That's the best one that I know of, yes.

THE COURT: Are you going to put the report in evidence?

MR. BREINDEL: Yes.

Would you mark this as Plaintiffs' Exhibit 871, a report entitled Sales Projections for Textura, Inc. 1967-1976, by Professor John M. Bruner.

(Plaintiffs' Exhibit 871 was marked for identification.)

Q Do you have a copy of your report in front of you?

A Yes.

Q Is Plaintiffs' Exhibit 871 the report we have been discussing?

A I believe so. I have not seen the exhibit.

THE COURT: Show him the one that has been marked.

THE WITNESS: Yes, it is.

Q Now, that report, Plaintiffs' Exhibit 871, contains estimates or projections as to when Textura would have achieved its ultimate market share?

A That is correct.

Q What are those best esimates?

MR. TOPKIS: The report, I would suggest, speaks for itself. I don't particularly admire or respect what

THE COURT: We have already received some of his conclusions.

MR. TOPKIS: The only conclusion we have received is that seven per cent, and I would move to strike it, because it is seven per cent of what, your Honor? He says seven per cent of a market, but that is the one thing it is not. It is seven per cent of some other market.

MR. BREINDEL: He doesn't say it is seven per cent of the market. He says it is seven per cent of a predictor and there is a correlation to what predictor.

THE COURT: We will take a short recess.

(Short recess.)

(Jury in box.)

BY MR. BREINDEL:

Q Professor Bruner, can you tell us why you used SIC-2591 in your report?

A I used SIC-2591 as a predictor of future sales because I thought it was the most accurate or the best predictor for which information was available.

SIC codes in general are recommended to us in all texts that I know of in forecasting and they are commonly used in this regard.

Q I believe previously you testified that in preparing your report you had arrived at a conclusion that

which is drapery hardware blinds and shades, so they have their sales in an amount equal to seven per cent of that. That is the best predictor of where their sales would be. They do complete with that directly as a business.

Q Can you tell us again, Professor, why you used SIC Code 2591 as your predictor in your study?

A Because I thought that was the most accurate predictor for which data was savailable.

Q And your conclusion is that Textura's sales would be equivalent to seven per cent of that predictor? Is that correct?

A That is correct.

Q Now, what is the basis of that conclusion?

A The basis of that conclusion is the fact that during the period 1962 through 1966 Textura had sales which were the equivalent of seven per cent of that predictor or seven per cent of that industry as defined by SIC-2591, so they historically had that relationship in terms of their sales to this particular industry.

MR. TOPKIS: In California?

THE WITNESS: That is correct, in California, and that is the basis for saying that performance in California would translate to the industry -- I beg your pardon -- to the national market.

projections, is that correct?

A That's correct.

Q Why do you have two sets of projections?

A I have two different sets of projections of sales. One is based on the assumption that Textura would receive this ultimate market share, this national position, if you would, with respect to the industry, as I have defined the industry, in three years. And the other is based on the assumption that they would not attain this 7 per cent of this industry until five years.

The reason for the five years is simply that it is a more conservative estimate. The reason for the three years is the fact that the experience in California for Textura was such that they started in 1962, or their sales in 1962 were about 6-some per cent. In 1963 it went to 7.7 per cent. So they did effectively achieve this level of sales in a very short period of time. Therefore, it is reasonable to assume that they would achieve the national market in that same period of time, particularly since they had their sales force, their sales organization, product line, et cetera, very well established at the time of 1966.

Q Based on your knowledge of economics and your past experience in economic forecasting, do you

have an opinion as to whether the sales projections set forth at Table 4 of your report are fair and accurate?

A Yes, I have an opinion about that. The accuracy of any forecast is a function of how you went about it, the methodology. I have total confidence in the methodology of the approach I used. It is very consistent, it is used throughout industry. In that regard I have no qualms whatsoever about the sales estimates that are used.

Q Professor Bruner, is your compensation from plaintiffs in any way dependent upon the outcome of this lawsuit?

A No, sir.

Q Can you tell the jury the manner in which you are being compensated?

A I was being paid on an hourly basis for work performed for the plaintiff.

MR. BREINDEL: I have no further questions of this witness.

CROSS EXAMINATION

BY MR. TOPKIS:

Q Professor, how much are you being paid an hour?

A An approximation of $50 an hour.

Q How many hours are there in a day, as you calculate it?

A As I calculate a day?

Q Yes.

A A day is an open-ended number of hours.

Q If you worked 15 hours in a day you would get 15 times 50?

A If I had worked that.

Q You came in from California to come here?

A Yes.

Q Were you paid for your traveling?

A I was paid for travel expenses. I was not paid for the time I traveled.

Q You did some work during the time you were in California preparing this report?

A And other reports and background data, that's correct?

Q How many hours have you put in on this matter up to now?

A I don't know the number of hours.

Q You have kept records?

A Yes, I have records, and I have been paid, yes, sir.

Q And you don't know how much?

A Yes. Fairly closely, about $2000.

Q About $8000?

A No, sir. I wish. Make that $2000.

Q $2000?

A Yes, sir.

Q And you will be paid more?

A I don't believe so. Not unless there is more work required. I have an advance for this trip to include expenses. I really don't know the total, but it would be not more than $2500, I suppose, all told.

Q What's your salary as a professor?

A My salary as a professor on a nine-month basis -- I presume that's what you mean, that is the academic year -- that's $18,000.

Q And you supplement that by testifying?

A I am in the present case, yes.

Q Have you testified before?

A Not for compensation.

Q This is your first experience?

A For compensation. That's correct. Although I provided information which has been used by legal counsel.

Q You testified, Professor -- let me make sure I understand this report, this document, Sales Projections for Textura, Inc., 1967 to 1976.

MR. TOPKIS: Havethe jurors been supplied with copies of this?

THE COURT: They have a copy of it.

Q For the year 1966, Professor, you list on page 2 of this report sales for Textura. Do you see that?

A Yes, sir.

Q Down at the bottom?

A Yes.

Q $1.609 million of sales.

Now, those aren't actually Textura's sales for that year, are they?

A They are an estimate of what Textura's sales would have been.

Q They are not?

A Yes, sir, they are, had Textura performed at the same rate throughout the year, had they been in full operation for the entire year as they were during the first six months.

So for the first six months we take their sales figure, which, as I recall, was like $804,000, then they were in actual operation. This would

have resulted in the sales figure there.

Q Professor, you don't have any idea of your own personal knowledge whether Textura was or wasn't in any business in 1966, do you? You are just going on what you were told by somebody?

A I was not there at the time.

Q Exactly. So you don't know what their sales were for the year 1966, do you?

A I know what their sales were for the first six months.

Q No, you know what figures appeared on a piece of paper that somebody gave you, isn't that right?

A That's the only way anybody can be approsed of their sales, sir.

Q Possibly the person who prepared the figures might be able to apprise you a little better. But in any event, you did not use in your calculations the sales for Textura for the year 1966 revealed on Defendants' Exhibit B, did you?

A I don't know Exhibit B, sir.

Q I call your attention to sales of $1.208 million there shown. That is not the figure you used, is it?

A I don't know this figure, no, sir. I

haven't seen Exhibit B.

Q So counsel for plaintiffs or Mr. Powrie gave you these actual sales figures for the year 1966, did they?

MR. BREINDEL: I object to the characterization of actual sales figures, your Honor.

MR. TOPKIS: That is exactly what they are.

THE COURT: I don't know. It's an exhibit.

MR. BREINDEL: I have no quarrel with that. It is our position the actual sales figures are shown in the year-end statements which are in evidence and which are referred to.

MR. TOPKIS: I am referring to the year 1966, and I am referring to a piece of paper which plaintiffs' counsel gave us which has for the combined gross annual revenues of Textura and Fenestra for the year 1966 the figure of $1.208 million. It is not something I made up, it is something that he made up and gave to me.

Q But I say to the witness: you weren't given this figure, were you, professor?

A No.

Q So what you did was for the year 1966 doubled

the sales for the first six months of 1966, which were given you, right?

A That is correct.

Q And you did that because Mr. Powrie told you to, isn't that right?

A No, sir.

Q You did it because counsel for plaintiffs told you to?

A That is equally incorrect.

Q You didn't know anything of your own knowledge about the year 1966, did you?

A No, sir. I had to make an assumption, which is the problem with forecasting, and so your reasonable assumption would be that since they performed at a particular level during six months, that the balance of the year would be twice that amount.

Q All right.

Generally, then, you like to go on history, is that right, professor? I think you so testified, didn't you? It is important?

A To go on history? I think you utilize benchmark data where possible.

Q And you like to get a long sweep, right?

A Not necessarily. That depends.

Q Not necessarily what?

A That depends. A long sweep is not necessarily an appropriate sweep.

Q How many years is generally an appropriate sweep?

A You couldn't say, I don't believe. You have to take a particular for instance and talk about it.

Q What made you decide to begin with 1962 here?

A The reason for beginning with 1962 was based on conversation with the plaintiff to the extent that -- which resulted, I believe it is in testimony right now --

Q This was based on conversations with Mr. Powrie?

A That's correct.

Q And so you decided to start your analysis of Textura's sales with the year 1962 because of what Mr. Powrie told you, right?

A Because of my conversation with Mr. Powrie and the questions I asked of him, right.

Q Did Mr. Powrie tell you what Textura's sales had been in 1960?

A Let me double check that. I believe I

have the sales data prior to 1962. I'm sure I do. I don't have it in front of me. I am sure I do.

Q From 1960 to 1961 Textura's sales went down sharply, didn't they?

A I don't have the schedule. I have to take your word for it.

Q And if you compare 1960 and 1962 Textura's sales are down from 1960 to 1962, aren't they?

A Again the same comment. I don't have the schedule in front of me. As I recall --

Q You don't have it? You weren't given it?

A I was given it. I said I do not have it in front of me.

Q I will give you a copy of Defendants' Exhibit B, the original of Defendants' Exhibit B.

MR. TOPKIS: May I distribute copies to the jurors, your Honor?

THE COURT: Yes.

(Exhibit distributed to jury.)

BY MR. TOPKIS:

Q So, professor, if we started with 1960 we would see that between 1960 and 1962 Textura's sales actually went down, didn't they?

A The data that I have, which I have located in my notes here, suggests that sales went down from '60 to '61, increased slightly from '61 to '62.

Q Right. But as between '60 and '62 they were down, comparing '60 and '62?

A '62 is less than 1960, that's correct. Yes, sir.

Q Right. And you have used in your table a figure for 1966 of $1.609 million, right?

A That's correct.

Q But if you used the actual figure of $1.208 million,that's a decrease from 1965, isn't it?

A Yes, it is. Very definitely. But if you incorporate this -- if you compute the percentage, which I have done, if you back off to -- as I recall, it was an October 31st financial statement --

Q October 31st?

A Is that correct?

Q I don't think so.

A I would have to check with my counsel on that. The sales figure that was given for -- as I recall, it was for the actual for the year, which was 1.129 million. If I use that the results were not --

Q What year are you talking about?

A For 1966.

Q Hold it just a second.

So as of October 31, 1966 there were $1.129 million of sales, is that right?

A Yes, sir. If I had used that, this percentage figure would not change appreciably, it would still be around 7 per cent.

Q In any event, you did not use the actual figure, you used an assumption used by doubling the sales figures for the first six months?

A Yes, sir.

Q You didn't check to see whether in prior years sales of the first six months were half of sales for the whole year, did you?

A No, we did not have those data, but I did inquire --

Q You didn't?

A I did not.

Q You were not given them by counsel for the plaintiff nor by Mr. Powrie?

A No, sir. And I did not inquire. I did ask --

Q You have answered my question.

A Not from my standpoint I did not.

Q Now, what you have done here in this report is to compare Textura's sales, as I understand it, of curtains --

A No, sir.

Q Not with -- well, that's what Textura makes and sells or made and sold, isn't it? Textura made and sold and installed curtains, isn't that right?

A They offered a service which would include selling curtains, and they did sell to include drapery hardware and window coverings in a general sense, yes, that's correct.

Q Okay. And you did not compare their sles with the total of all sales of people doing the same thing, did you?

A There is no way to do that.

Q You didn't do it?

A There is no way to do it.

Q And so you didn't do it?

A That's correct.

Q Instead, you compared their sales with industry sales for SIC, that is, Standard Industrial Code, 2591, drapery hardware, and blinds and shades, right?

A That's correct.

Q And SIC 2591 is something that the Bureau of the Census prepares, is that right?

A That's correct.

Q And that is a tabulation not of curtains and not of drapes but of hardware and blinds and shades, is that right?

A That is correct.

Q You know that Textura's sales of curtains are sales of fabrics which are referred to as decorative fiber glass fabrics, is that right? You are familiar with that fact?

A Yes.

Q Did you by any chance know that the Bureau of the Census maintains records of the national sales of decorative glass fiber fabrics?

A Yes. There are other SIC codes, that's correct. There are a whole variety of these codes.

Q Specifically do you know if the Bureau of the Census maintains and has maintained for many years records of national and regional sales of decorative glass fabrics?

A I don't know the specific SIC code, no.

Q You didn't look into that?

A I don't know the specific SIC code for that.

Q I am not asking you for a number, professor; I am asking you whether in point of fact it had come to your attention whenyou prepared this report that the Bureau of the Census annually tabulated sales of decorative glass fiber fabrics. It had come to your attention?

A That's correct.

Q Let me ask you, professor. The trend, national trend, of sales of drapery hardware and blinds and shades in the years from 1962 to 1976 was up, right, according to the fact and according to your projections?

A Yes. 1962 through 1972 we know.

Q 1962 to 1972 it was up, and on that basis you projected from '72 to '76 it would have gone still higher, is that right?

A At a rate of about 5 per cent, yes, sir, that's correct.

Q Do you happen to know what the sales trend according to the census was for decorative glass fiber fabrics in the same years?

A No, I do not.

Q You do not?

A No, sir.

Q Professor, if I were to suggest to you that between 1966 and 1972 the sales nationally of glass fiber decorative fabrics recorded by the Bureau of Census dropped 50 per cent, would that be considered by you as a significant factor to consider in projecting the success of a company engaged in selling decorative glass fiber fabrics?

A It would have to be considered, yes.

Q And you didn't consider it?

A No, sir.

Q You didn't even look.

Let's go back to your report. Let's go back to your figures, professor. Turning to page 3 of your report, you start with industry sales, California?

A Yes.

Q That's sales of drapery hardware and blinds and shades in California for the year 1962?

A That's correct.

Q Where do you get a figure from, professor?

A That figure is obtained by the process of interpolation between census years. One of the

problems we have --

Q Excuse me just a second. That means it is not a figure that the Bureau of the Census of the United States Government developed, is that correct?

A That's correct.

Q Okay.

A Their figure is for census years.

Q Was there a prior year -- did you have a figure for an earlier year that the Bureau of the Census gave?

A Yes, sir.

Q That figure does not appear in your report, does it, Professor?

A No, it does not.

The figure for 1958 is available. I used it.

Q But you didn't give it to us?

A No, sir. I would be glad to, if you like.

Q If you happen to have it I welcome it.

A Yes, I do.

Q Do you have the SIC 2591 for 1958?

A Yes, sir. That is 12.7.

Q 12.7?

A Million, yes, sir. That's for California.

Q In 1958?

A That's correct.

Q Do you have the document itself? That's what I am asking for.

A I believe I do. I would have to double check to see where those data are.

Q Please.

A I don't have it with me on the stand, no, sir.

Q Perhaps at a recess, professor, you will find it for me.

Now, professor, you recognize the documents known as current industrial reports of the Bureau of the Census, don't you?

A If I see them, yes.

Q Let me show you this and ask you whether this isn't the current industrial report for the year 1965-66 related to production of man-made fiber.

A Man-made fiber.

Q Yes.

A It either is or is not.

MR. TOPKIS: No need to trouble the professor. I will represent to the court it is a census document.

THE WITNESS: It is, but I want to see which SIC code it is.

Q I will be glad to call your attention to a particular line. I am focusing, professor, on the figure for household fabrics which includes marquisettes, drapery and upholstery fabrics and other household fabrics for the year 1966, do you see that?

A I believe I do. Let me see if I have the right page. These pages are not numbered.

Q No,they are not, unfortunately.

A Would you tell me if this is the right page. Is this what you are talking about?

Q Yes, sir. I am referring to the total of household fabrics.

A Right.

Q For the year 1966?

A Yes.

Q And that figure is 150 million linear yards?

A And 284,000, yes, sir.

Q There is a figure also for industrial fabrics, isn't there?

A That's correct.

Q We are not concerned with that. So that the 150 million-odd for 1966 -- and I will ask you to

look for the same, the comparable figure for 1972 --

A Yes, sir.

Q Would you read the 1972 figure for me, please?

A This is for household fabrics, 76.352 million.

Q So the figure for 1966 was 150 million and for 1972 it is 76 million, right?

A Those are for household fabrics, that's correct.

Q As opposed to industrial fabrics?

A As opposed to any other that they had. I don't know their classifications, but certainly it is household as such.

Q That's what they have. There is the total, the industrial, and household, right? Aren't those the classifications?

A I didn't see there were other than household. All I read was the total for household, period.

MR. TOPKIS: May I have these marked for identification, and then I will offer them in evidence.

(Defendants' Exhibits AK and AL were marked for identification.)

MR. TOPKIS: I offer them in evidence.

MR. BREINDEL: No objection.

(Defendants' Exhibits AK and AL were received in evidence.)

Q Just so we understand each other, professor, the figures that you used of SIC 2591 from 1966 to 1972 went up from $229 million to $363 million, right?

A That's correct.

Q But actual sales of decoratorative fiber glass fabrics between those two years went down?

A For household purposes, that's correct.

Q Right.

All right, professor. Now, you compared Textura's sales with sales of hardware and related items, is that right, because you thought that was most accurate?

A Of blinds and shades, yes, correct, because that is window coverings, and because that is more representative of the commercial type of business as opposed to household which you have referenced, which there thrust was decidedly not toward this household market at all. To the contrary, in fact, away from that.

Q The business Textura was in was selling glass fabric curtains and related products, right?

A Those are the products. The business they were in is a very difficult notion. That is, the perception of the buyer, and that means a window covering notion, which they had shades, and the like. This would mean their product would substitute for blinds, et cetera, in a rough sense.

Q One thing Textura didn't sell was any linen drapes, right?

A As far as I know.

Q Nor cotton, polyester, nor rayon drapes, right?

A Again, as far as I know, that's right.

Q And if, professor, following 1966 the national taste had switched from any interest in glass fiber drapes to an interest in polyester drapes or cotton drapes or linen drapes or dacron crapes or Venetian blinds, Textura would have had no share in that business if it had stayed in the glass fiber fabric business, right?

A If they had not adapted to what the public interest was in terms of the market segments that they attempted to attract, which were the commercial end of things primarily, I would agree. If they did not adapt to that and in fact it changed.

Q They had never had any experience, to your knowledge, in selling linen drapes or cotton drapes or polyester drapes or dacron drapes, had they, or nylon drapes?

A Not to my knowledge.

Q So if there were a developing interest in the country for draperies made out of these different fabrics, the figures that you report or that you rely on, these 2591 figures of drapery hardware and the like could have gone way up, but somebody engated solely in the business of selling draperies made out of decorative fiber glass fabrics could have gone straight down? Right?

A If they did not match the desires of the industry, that is correct.

Q Now, Professor, you have on page 5 of your report -- incidentally, your report regularly speaks of market share, an averate market share. You don't mean market share or average market share, do you? You mean a percentage of a predictor?

A All right, let's phrase it that way.

Q Well, that is the way you would phrase it?

A Yes, I would prefer to phrase it that way from the standpoint of clarity here.

Q Whose idea was it to call it market share? Yours?

A It is my idea and it is a share of that industry.

Q But not the market?

A Market is very difficult to define.

Q But we know this, if I am selling hot dogs, I

don't have any share of the roll market?

A I agree with that.

Q And if I am selling draperies I have no share of the Venetian blind market?

A But that is a share of the market that Textura has as best we could interpret it.

Q Now, you say you computed two sales projections on two assumptions, that it would take Textura three years and that it would take Textura five years to reach a nationwide market share that was equal to the California market share?

A That is correct?

Q Incicentally, before we go to the California market share, where did you get those California figure from?

I'm sorry, you're going to give me that subsequently at recess, the California figures. But let's look at how Textura did in California, and since Textura in 1965 started to expand outside of California and open a New York office and a Chicago office, perhaps in three years or five years Textural would be doing as well throughout the country as it was in California?

Is that putting it into layman's language accurately?

A Yes, that their ultimate market share, however, whatever that might be, their ultimate sales value would have the same relationship to this predictor as California sales during the period 1962 through 1966.

Q If they managed to do as well in the rest of the country as they did in California?

A That is correct.

Q They might have done as well as they did in California, they might have done better, and they might have done worse?

A That is correct.

Q And there is no way of knowing, is there?

A There is no crystal ball that can tell us. That is the problem of forecasting in a nutshell.

Q You might be right and you might be wrong?

A You make the best estimate estimate and judgment of the future that you can, that is correct.

Q Professor, your estimate is that by 1976 Textura would have had sales of $33 million? Is that right?

A By 1966?

Q By 1976, sir?

A Yes, by 1976 if I used either of those projections and if they maintained the same relationship that they had in California to this industry, to SIC-2591, if they

maintained that same relationship, that is what they would have had, yes, sir.

Q Would you regard it as a reasonable forecast that this California company, Textura, if it had stayed in business would have had national sales of $33 million? Is that a reasonable forecast?

A That is an output of a reasonable methodology, that is correct.

Q Please answer my question yes or no.

Will you stake your professional reputation on the reasonableness of that forecast?

A On the reasonableless of the methodology, and, therefore, on the forecast.

Q Are you telling this Court and jury that a business which had never had annual sales of in excess of $1,412,000, and they did that in 1965, would with reasonable probability have expected sales, annual sales to hit $33 million by 1976, that is to say, approximately twenty times larger?

A If they had achieved the same relationship that is what they would have done.

Q You know of the old saying, "If I had wheels I'd be a bicycle?"

A I have heard several.

Q Would you agree with me the two "ifs" are approximately equal in their likelihood?

A No.

Q You think this Textura Company if it had stayed in business would have multiplied its sales twenty times In those ten years?

A I think that is possible and a likelihood, given the assumptions of this report, yes.

Q Well, you ha e put in a number of assumptions?

A Assumptions are a requisite for any forecast, sir, because we are dealing with an unknown.

Q Well, let's come back from 1967.

Do you say that it was reasonable to forecast that in 1967, the year immediately succeeding 1966, if Textura had stayed in business its sales would have been $6,036,000?

A That is the projection based on their attaining a similar market share.

Q I ask you whether you regard that as reasonable?

A Totally consistent and, therefore, reasonable.

Q They would have multiplied their sales four times in one year?

A Absolutely.

Q They have never done that in their history?

A That is correct. Their history was not at a

national level.

Q They were in the national business in '64 and '65, but in '66 they did not have any four times multiplication? Didn't you take that into consideration?

A Yes, I took into consideration the comments of Mr. Powrie as to the thrust of the business and what they were trying to do and the development of the product line, and this would have resulted in my estimation the attainment of the same relative performance in the national markets as they had in California.

If they did this, we made two assumptions, one of three years and one five. Then there is an estimate for interim years.

Q If they did as well as one might have hoped they would, they would have been selling at a rate of 6 million the next year, 13 million in 1968, 21 million in 1969, and -- geee, they went up to only $23 million in 1970.

What went wrong there?

A Nothing went wrong. That is the assumption of the model that says how long does it take them to achieve that 7 per cent, and the one projection says three years and the other five.

After they receive that nationwide market share, which is the way you commonly forecast, then you assume

they would change up or down or sideways as the market changes.

Q As the market for drapery, hardware and venetian blinds changed?

A In this market, they would vary with that. That is a reasonable predictor of what would take place.

Q Now, by 1970 they would have been doing 23 million and by 1976 they would have been 33 million?

A Yes.

Q Do you happen to know what Mr. Powrie estimated they would be doing?

A In 1976? I don't know what he estimated they would be doing.

Q Would it startle you to hear that Mr. Powrie forecast that his company would have had annual sales of about $2 million?

A No, it would not startle me in the least, sir.

Q Would anything startle you?

A Not an estimate like that, no. That wasn't my job to ask him what he thought or to come up with some result or to apply a method.

Q You didn't think it would be relevant in formulating an accurate forecast to consult Mr. Powrie and say, "Mr. Powrie, what is your best estimate of what you

will be doing during these years?" You didn't ask him that question?

A My notion is that I would have got no direction from Mr. Powrie as to how he wanted me to go about forecasting or from counsel, or what they thought the result should be or shouldn't be, and I don't think it is appropriate to do anything other than obtain the data, the benchmark data the best I can and then to apply methodology to that as best I can.

Q So you forecast annual sales by 1976 of 33 million for Textura? Right?

A That is correct.

Q Well, that actually is just one forecast that you have made, isn't it, Professor?

A There are two separate projections in this one, that is right. There is another forecast. There was an earlier forecast, that is correct.

Q Yes. On another occasion you forecast annual sales of $18,846,000, didn't you?

A There were several projections of alternative sales for specific projections, one of which was the amount you mentioned, yes.

Q So in one you forecast sales of 18 million, and at another time you forecast sales of only 16,158,000,

didn't you, Professor?

A Forecast sales in that earlier projection it varied from the two amounts you mentioned on the somewhat optimistic side of that to two others, which were approximately eight or nine million, give or take.

Q So in your first report prepared for use in this litigation your forecast annual sales for Textura in 1976 of a possible $8,080,000?

A Yes.

Q Of a possible $9,423,000?

A Yes.

Q Of a possible $16,058,000 and of a possible $18,846,000?

A That is correct.

Q That was an earlier set of forecasts which you prepared for this litigation?

A That is correct.

Q When you prepared them you regarded them all as reasonably right?

A Absolutely. They were a logical outcome of the method and data base I had to work with.

Q Then you went off and instead of offering that report to the Court and jury you come up with this new one which says you forecast sales in 1976 of $33,305,000?

A I came up with an additional report, that is correct.

Q Did somebody tell you, Professor, that sales of $18 million were not high enough?

A Nobody commented to me about the magnitude of the salesforecast one way or the other.

Q It was just suggested that you go back and redo your figures?

A No, sir, it was not suggested by anybody that I do anything.

Q This was your idea?

A Thay is correct.

Q And you were paid at the same rate for doing this new report as you had been paid for doing the old one?

A That is correct.

Q How much time did the first report take you, Professor?

A I could not tell you in terms of the number of hours.

Q How much time did the second report take you?

A Substantially less time. How much less? I would suppose 50 per cent, very roughly. It's very difficult to keep in mind, have in mind.

Q Professor, let me ask you as to your report,

page 4, you say:

"As an example, Textura sales in California in 1963 were $964,000."

Do you see that?

Q Where did you get that figure?

A That figure was obtained from company records, as I understand -- oh, I beg your pardon -- that figure was obtained from records provided by Mr. Powrie. The proportion of the total sales that he had were inside, within California.

Q Do you have the information that was given you which reveals this figure?

A No, sir, I do not.

MR. TOPKIS: I don't believe that figure is in evidence, and, in consequence, I think it would be appropriate to strike, at least, that much from this report because it would appear to be based on confessed hearsay.

THE COURT: There has to be some basis for that figure.

MR. BREINDEL: We intend to put Mr. Powrie back on the stand as to that and various other matters as well.

THE COURT: We will wait, then, until we get some substantiation.

You didn't receive any breakdown? You just received the net figure?

THE WITNESS: I received a break down of total sales, and sales within California and sales outside of California?

THE COURT: Which year was that?

BY MR. TOPKIS:

Q It is for all the years?

A I received it for all the years.

Q This was all information supplied to you by Mr. Powrie and you don't have that with uou now?

A I don't have it now.

MR. TOPKIS: I object. That is the foundation of this whole report.

Q Now, when we were talking before about the possible consequences of Textura opening offices at various places around the country, you don't know where those offices were, do you?

A I know where some of them were that they did in fact open, yes.

Q Did you ever visit those offices?

A No, sir, I did not.

Q You don't know how many salesmen were employed in each of those offices?

A No, sir, I do not.

Q You don't know whether they were good salesmen or bad salesmen?

A I don't know how you define good or bad. I have been in sales and I appreciate your inference. I presume they would be good sales people.

Q You presume they would be good sales people?

A Yes. Why would somebody hire to the contrary?

Q I'm sorry?

A Why would somebody employ to the contrary?

Q If you followed that logic to its conclusion you conclude that all salesmen are good salesmen who are working and that is not really a safe assumption?

A It depends on how you define good. On your level, liken it to counsel, the same thing.

Q Let me ask you this, do you know whether there were any other companies around the country engaged in the same business that Textura was engaged in?

A It depends on how you define the term business It's a tough one in Academia. My understanding is that the shade screen co-efficient in technical data if you would in the way in which the products were sold and did set them apart.

Q Well, that is what every business tries to do?

A Yes.

Q Set itself apart?

A Yes. Some are more successful than others.

Q You don't know how many other companies around the country were offering to install draperies in newly constructed offices and industrial buildings, do you? You didn't make any study of that?

A The total number of companies in the industry as you define the industry to sell draperies as such? I don't know the total number of companies that sold draperies directly to businesses.

Q You didn't look into that subject? Right?

A Not in terms of the total number of firms.

Q You didn't make any attempt to find out what kind of competition Textura might be meeting as it went around the country? That wasn't part of your assignment?

A Part of my assignment was not to determine the type of competition; it was to determine the types of products in a sense, and this notion of the screen shade co-efficient set them apart and they were successful, and that it was a unique approach not only to merchandising, but to the product line.

Q They had been very successful with that, you say?

A They were in the process and they had been, yes.

in terms of contracts they had and contacts within the industry.

Q What gave you that idea, Professor? Do you regard a company whose sales went from $1,025,000 in 1960 to $1,208,000 in 1966 as being a successful company?

A From 1962 on they had a general thrust of their business established. Then through their consolidation efforts post the acquisition of Glass Fabrics and the like they were in position to attack a national market, yes.

Q That is based on what Mr. Powrie told you and not on any independent study of your own?

A It is based on the information provided in terms of sales, company records and the like.

Q Furnished to you by Mr. Powrie and not produced as a result of any study of your own?

A The singular source would be company data, yes.

Q And Mr. Powrie was your contact at the company?

A That is correct.

Q Would you please explain to me, Professor, how it is that you lok at a company whose sales went from $1,025,000 in 1960 to $1,208,000 in 1966 and you say and you forecast that in the next year, 1967, that company's sales are going to multiply four-fold?

A Yes.

Q It depends on what? The assumptions you make?

A Any argument depends on the assumptions you make.

Q And that is what this report is, what you just called it, an argument?

A I didn't mean to call it an argument. It's a projection.

Q That is what I heard.

A It is a projection based on some assumptions, that is correct.

Q It would be possible, wouldn't it, Professor, to make other assumptions and arrive at the conclusion that any reasonable man looking at Textura in 1966 would have said that this company is headed for disaster if you changed the assumptions?

A I don't think it would be consistent if the person looked at the assumptions. I think the assumptions that I used are reasonable.

Q Let me ask you this, Professor, if you had been around in 1966 and had been asked to take a look at Textura, would you have thought it a sound company to invest in?

A I don't view companies with the idea of investing in them, so that is an unfortunate question. I don't do

that.

Q Well, you say that --

A It would have been based on projections of any corporation estimate to present value of expected earnings, and if at time I had projected earnings I would at that time, yes, have assumed it reasonable, although I don't invest in companies, but that is something else.

Q You don't invest in companies?

A No.

Q Forecasting is your business?

A No, sir, forecasting is not my business. I am employed by the University of Southern California to teach. In the process I do some forecasting.

Q Let me ask you this:

You have consulted for a number of other companies?

A That is correct.

Q Did any of them ever in one year have a four-fold increase in sales?

A I believe that Charter Diversified Services did.

Q Charter Diversified Services?

A In terms of assets, yes.

Q They are not in the business of selling anything?

A Selling their services, yes, sir, they are decidedly in that business.

Q And they were managing other people's money, like a bank?

A They have to sell that service just like Textura had to sell its products; they sold their services just like an insurance company sells service, exactly.

Q But that is the only company that you can think of that had a four-fold increase in sales?

A That I worked with?

Q Yes.

A Oh, I think a corporation owned by my brother had many more times than that.

Q I'm glad to hear that.

A Well, I'm glad you're glad.

THE COURT: Let's take a recess.

(Short recess.)

BY MR. TOPKIS:

Q During the recess did you find that document that I asked you for?

A No, sir, I don't have that with me.

MR. TOPKIS: I have no further questions and we move to strike the Professor's report.

THE COURT: We are going to have some testimony, I gather, from Mr. Powrie, so I will reserve decision.

Q What was the predictor that you used as the basis for your first report?

A The primary predictor there was a value of construction for private, nonresidential purposes, which would be associated rather closely, I assume, with the commercial high-rise thrust of business, which was the dominant thrust of his business.

Q Is it your opinion that SIC 2591 is a more accurate predictor than the predictor of nonresidential construction statistics used in your first report?

A Yes, I think it should be, yes, sir.

Q In connection with your second report, Mr. Topkis questioned you as to Exhibits AK and AL, and he specifically directed your attention to household fabric categories under which appears drapery and upholstery fabrics?

A Yes.

Q Can you tell us why you didn't use household fabrics as a predictor in y our report?

A The whole notion of household fabrics gets to the residential housing industry, if you would, or the housing sector of his market, which Textura was not interested in developing. They are not involved other than through decorator sales and they did not contemplate further involvement. Their thrust was

to a commercial-business-type sector. So household fabrics are not relevant to the commercial sector.

Q You testified, and I believe your report on page 2 states, that you used Textura sales figures for 1966 -- you arrived at that by doubling the figures shown on Plaintiffs' Exhibit 47, is that correct?

A That's correct.

Q If you had in fact used the figures Mr. Topkis referred to, which appeared on Defendants' Exhibit B, which I believe was $1.208 million, would that have resulted in a significant decrease in your projected sales?

A No, it would not. If we used that figure, although I have not calculated it, with that specific figure, I have calculated it with 1.129 million -- no, the percentage of that predictor would still have been about 7 per cent.

Q If you had begun your projections with the year 1958 instead of 1962, and used the material referred to in Textura's year-end statements beginning -- in Glass Fabrics beginning in 1958, would that have resulted in a significant change in your projections.

MR. TOPKIS: Are the reports beginning in 1958 in evidence?

you.

(Witness excused.)

MR. BREINDEL: Your Honor, would you like to proceed with the next witness before lunch?

THE COURT: Yes.

MR. BREINDEL: For our next witness we would like to call Dr. Mosich to the stand.

A N E L I S E N. M O S I C H, called as a witness by plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BREINDEL:

Q What is your present occupation?

A I am a professor of accounting at the University of Southern California.

Q What subjects do you teach?

A I teach all levels of accounting, perhaps, excluding taxation and auditing.

Q To whom do you teach these subjects?

A I teach undergraduate studies, studies at the master's level, doctoral level, businessmen, and also in-house training programs for some large firms like the Bank of America, Haskins & Sells, an international CPA firm.

Q Do you have any administrative duties at the University of Southern California?

A Currently, I don't. In the past I have been director of the doctoral program in the School of Business Administration, and for four years, ending last month, I was chairman of the accounting department.

Q Are you an accountant?

A Yes, sir.

Q Are you certified?

A Yes, sir.

Q Would you tell me what the California State Board of Accountancy is?

A The California State Board of Accountancy is charged with the responsibility of administering and policing, if you will, the accounting profession in the State of California.

Q Have you performed any services for the California State Board of accountancy?

A Yes, I have.

Q What are those services?

A I have been an examiner for the State Board of Accountancy, and a consultant.

Q Where did you do your undergraduate work?

A University of California, Los Angeles.

Q What degree did you get?

A Bachelor of science in accounting.

Q Have you done postgraduate work?

A Yes, sir.

Q Where?

A Also at the University of California at Los Angeles.

Q Do you have any graduate degrees?

A Yes, I do.

Q What are those?

A I have a Master of Business Administration and Doctor of Philosophy, both in the field of accounting.

Q Do you belong to any professional associations?

A Yes.

Q Which ones?

A The American Institute of Certified Public Accountants, the California Society of Certified Public Accountants, the American Accounting Association. I believe that's all.

Q Have you received any research grants, professor?

A Yes, I have.

Q From whom?

A From the University of Southern California and two international CPA firms.

Q Have you received any fellowships, professor?

A Yes, I have.

Q From whom?

A Arthur Andersen & Company and Haskins & Sells & Company, both international firms of accountants.

Q Have you ever been retained as a consultant?

A Yes.

Q By whom?

A Various business firms and accounting firms?

Q Have you written any text books, professor?

A Yes, sir.

Q Would you tell us the names of those?

A I am a co-author of "Accounting, The Basis For Business Decision," published by McGraw-Hill, "Financial Accounting," also published by McGraw-Hill, "Intermediate Accounting," also McGraw-Hill, and "Modern Advanced Accounting," to be published within a few months.

Q Have you published any articles in professional accounting journals?

A Yes, sir.

Q Are you a regular contributor or editor to any such journals?

A I have been, and I am currently a contributing editor to a column in the Journal of Accountancy, which is published by the American Institute of CPAs.

Q Have you ever been retained previously to testify as an expert witness?

A Yes.

Q By whom?

A Various law firms in California, and by the United States attorney in Los Angeles.

Q Now, Professor Mosich, have you done any work for plaintiffs in connection with this lawsuit?

A Yes, I have.

Q Could you tell us what were you asked to do for plaintiffs?

A I have been asked to review the financial statements primarily for the period ending -- for the six-month period ending June 30, 1966, and to ascertain whether the accounting records were maintained adequately, and also to make a projection of what the net income before taxes might have been for the plaintiff based on the projections made by Professor Bruner.

Q Have you reviewed the books and records of Textura for the period 1964 through June 30, 1966?

MR. TOPKIS: Isn't that rather leading? I think the witness just told us what he was asked to do.

THE COURT: What did you do?

Q Did you review any books and records of Textura?

A Yes, primarily for the six months ending June 30, 1966. And for the purpose of ascertaining whether the records were reasonably maintained and financial statements prepared in accordance with generally accepted accounting principles, I did peruse the earlier set of records.

Q As a result of your review of Textura's books, do you have an opinion as to the condition in which those books and records were kept?

A I do.

Q What's that opinion?

A I think the books of Textura were reasonably maintained.

Q Based on your experience as an accountant, how would you compare the manner in which Textura's books and records were kept with other companies of comparable

size?

A Well, based on my own experience, I feel that the records of Textura were maintained as well, if not better than for companies of comparable size in that particular industry.

Q Do you have an opinion as to whether outside accountants could prepare financial statements fairly reflecting plaintiffs' financial position from the books and records you saw?

A I think they could, and they in fact did.

Q I show you a copy of a document in evidence as Plaintiffs' Exhibit 47. Are you familiar with that document?

A Yes.

Q Based upon your review of the books and records of Textura, do you have an opinion as to whether Plaintiffs' Exhibit 47, the June 30, 1966 statement prepared by Mr. Berman, was prepared in accordance with generally accepted accounting principles for unaudited statements?

MR. TOPKIS: Unaudited statements?

MR. BREINDEL: That's what I said.

MR.TOPKIS: Shouldn't there be some kind of preliminary question as to what are generally accepted

accounting principles for unaudited statements? Are there such things?

THE COURT: I think you could ask him that on cross examination.

MR. TOPKIS: Very well, your Honor.

Q Would you like my question repeated, professor?

A Yes, please.

MR. BREINDEL: Please repeat my question, Mr. Reporter.

(Question read.)

A Yes, I do.

Q And what's that opinion?

A I think they were prepared in accordance with generally accepted accounting principles for interim or so-called unaudited financial statements.

Q Are you aware that Plaintiffs' Exhibit 47 shows as an asset Mo-Vac distributorship in the amount of $200,000?

A Yes.

Q Do you have an opinion as to whether that entry is in accordance with generally accepted accounting principles?

A Yes.

the sixth-month income statement.

Q You are referring to Plaintiffs' Exhibit 47?

A That is correct. I took this income statement for a six-month period and used the relationships which existed at that time as a basis on which to project the net income for the subsequent 10-year period. When I say relationship, I'm referring specifically to the gross profit, which is obtained by deducting the cost, the direct cost of goods sold from sales and also the expenses, as to whether they tend to be fixed or tend to vary with the sales volume, and on the basis of the sales projections made by Professor Bruner and my assumptions as to the relationship between sales, gross profits, fixed and variable expenses, I made such a projection.

Q You made three sets of projections? Is that correct?

A That is correct.

Q Will you tell us the difference in methodology between each projection, each set of projections?

A Well, the first set was on the assumption that the market share would be achieved in three years. Typically, fixed expenses will not change from year to year, will not change materially if a company is a stable company. But a compny that is growing rapidly, whose

product mix and customers and geographic marketplace is changing, will naturally experience an increase in its fixed expenses, as well as its variable expenses. So my assumptions were -- for lack of anything better I felt this was the best information available to me -- my assumption was that the gross profit percentage for this six-month period ending June 30, 1966, would be maintained for the coming 10-year period.

I also assumed that the fixed expenses would be increasing at a rate of 20 per cent during the period of rapid increase in sales, that is, during the three-year period during which the company was, in fact, achieving under Professor Bruner's assumptions in its market share.

I finally assumed that the variable expenses, those expenes, such as commissions and wages of sales people, that they would be remaining at the same percentage of sales during the 10-year period as they were during the six-month period ending June 30, 1966. That was my first graph, my first projection.

My second projection was using the same methodology, by using the second set of figures of Professor Bruner's, namely, that the market share of Texturaw was achieved in five yeawrs, rather than in three years.

My assumptions as to gross profit rate remained the same as in the first schedule. My assumption as to fixed expenses increasing at the rate of 20 per cent was similar. It differed in that I assumed it would increase at 20 per cent, not for three years, but for five years, since there would be a period of rapidly increasing sales, and, finally, I also assumed that the variable expense would be the same as it had been for the six-month period ending June 30, 1966.

And, finally, my third projection was an academic exercise, perhaps, based on my business experience, experience as an accountant, to be conservative, to take as cautious an approach as I could based on the information that I had before me. So I made several assumptions.

For example, I took Dr. Bruner's figures where he assumed that the market share would be achieved not in three years, but in five years, and I cut his sales figures in approximately one-half, in most cases exactly one-half. I did so rounding off to avoid giving the impression of being accurate when, in fact, accuracy was obviously difficult to achieve in making projections over a 10-year period. So I cur the sales in half.

I assumed that the fixed expneses which I had earlier assumed would be increasing at the rate of 20 per

cent per year during the period of rapid growth, that these fixed expenses would be growing at even a faster rate, namely, 25 per cent.

I also assumed that the variable expenses would b higher as a percentage of sales, namely, 16 per cent, rather than 15.2 per cent.

And, finally, I assumed that the cost of goods sold would increase, resulting in a gross profit percentage of only 35 per cent, rather than 38.8 per cent, which was, in fact, realized, as exhibited by the June 30, 1966 statement for that six-month period, a reduction from 38.8 per cent down to 35 per cent.

So on the basis of these assumptions I extended computations for a 10-year period and came out with income projections into each of the 10 years.

Q So that your report shows three different sets of income projections for the period 1967 through 1976?

A That is correct.

Q Does your report also show the accumulated interest on projected net profits through 1974?

A Yes, I prepared a supplementary schedule using the income figures obtained in each of the three approaches and added interest at the rate of 7 per cent for any profits that might have been realized starting with 1967

through the end of 1974.

Q Does your report also show the discounted value of projected profits for 1975 and 1976?

A That is right. The end of 1974 was my approximately current date. So any profits that might have been earned for the period '75 and '76 I discounted back at a higher rate of interest, namely, 12 per cent.

MR. BREINDEL: Could we mark this report entitled Projected Income Statements for Textura, Limited, 1967-'76 by Dr. Mosich, Plaintiffs' Exhibit 873 for identification.

(Plaintiffs" Exhibit 873 was marked for identification.)

Q Professor Mosich, I now show you Plaintiffs' Exhibit 873 for identification and ask you if that is a copy of the report you prepared and that you were just testifying about?

A Yes.

MR. BREINDEL: I would like to offer it in evidence at this time.

MR. TOPKIS: Objection.

THE COURT: This hinges on the earlier report.

MR. BREINDEL: It certainly does, your Honor.

THE COURT: I will reserve decision until we straighten this out.

with Burlington?

"A The terms were net-30 days appearing on the invoice. As I think they are in all cases, Hess-Goldsmith.

"Q You mean --

"A But there were occasions when special arrangements were made for longer payment terms.

"Q Do you know about these special arrangements?

"A I know that they were made, yes.

"Q How do you know that?

"A Well, because I would be advised by the -- by Mr. Powrie or by the credit department or both of these arrangements. Since selling as either employee or selling agent for Burlington, we are obliged to obtain permission of the credit department before any shipment is made in asking for approval to ship Textura or Glass Fabrics materials. We were necessarily informed or learned of slowness of payments or lack of payments or special terms or anything pertaining to the credit.

"Q What did you learn about any special terms given to Textura or Glass Fabrics or Mr. Powrie?

"A That such arrangements periodically were made. To my recollection, they were changed on various occasions from -- they were always greater -- I'm not sure of al-

ways. Probably always greater than 30 days. And my recollection is that on some occasions he had arrangements for payment in 90 days, in some cases he had arrangements for payment in 120 days.

"Q Were you advised of these arrangements by anybody in Burlington?

"A Well, I --

"Q You mentioned Mr. Powrie.

"A Yes. I naturally would have been advised by a representative of the credit department.

"Q Can you identify any of the people?

"A Who might have been Mr. Donnelly or Mr. Cann.

"Q What about Mr. Schutz?

"A No, because Mr. Schutz is in New York and our normal contact is the Los Angeles credit department.

"Q Did you ever hear any complaints or criticism about Textura's or Glass Fabric's or Fenestra's selling methods?

"A The answer would be yes, I would have heard such criticism. They would have come from people in the jobbing business in Los Angeles who had in their mind what they thought was a proper approach to selling fabrics, and they necessarily regarded anyone who sold fabrics in a different way with some criticism."

"A All right.

"Q You used the term here 'a true converter of fiberglas drapery fabrics.' What did you mean by that?

"A I meant to infer that they would not be selling products directly to users but would be selling them to a secondary line of distribution."

MR. HARDISON: "Q Did you make a special point of telling Mr. Hughes this?

"A No special point. It's a point of information, as the rest of the information.

"Q Do you recall why you referred to this?

"A Well, because only to give him an idea of how materials would be disposed of.

"Q Was Burlington interested in having fiberglas drapery fabrics distributed through jobbers?

"A They were interested in furthering the sale of fiberglas fbrics.

"Q Did they have any interest in traditional distribution methods?

"A Not particularly, no."

MR. BURGESS: Page 32, lines 6 to 21:

"Q Did you ever talk to Mr. Kahn about Textura's selling methods?

"A Yes.

"Q When was the first such conversation?

"A I would judge some time during the year 1966.

"Q And what was said?

"A Jim, after having been out here for some time, was pleased with the direct sale of materials through Textura, but he felt that there was a large opportunity for sale of fabrics through jobbers that was not being explored by Textura, and he felt that there was a market that existed that was not being fulfilled.

"Q Did he indicate what kind of sales he had in mind?

"A Well, he felt that so-called jobbers could do a good job in selling fiberglas if they had it available at a reasonable price."

Page 33, line 8:

"Q Do you recall what you said?

"A No. But I probably agreed with him that there was an opportunity for the greater sale of Glass Fabrics that was of concern to me as it was to him. We were both looking toward expanding the various methods of selling fabrics and the total market penetration."

MR. HARDISON: "Q" --

MR. BURGESS: I will object to the next reading of lines on 33, 34 and 35 as calling for speculation.

Q How were those changes executed? How were they accomplished?

A Well, they were not -- they were usually started by a yarn increase. I think that all the price increases we have ever had have been a result of price increases from the two yarn producers that supply our requirements.

You would take the total amount of yarn you expected to use, convert that to the fabric that you expected to sell, and determine that you felt that to pass the cost increase through you would need to increase your prices 4, 5, 6 per cent, and would do so.

I think that answers your question.

Q How was this price increase communicated to your competitors?

A In at least one instance I instigated a meeting at the Murray Hotel. I would say it was 1962. Probably 1962. I called Mr. Schwebel and Mr. Gusman and Mr. Weiss and suggested that we have a meeting to see what we wanted to do about the prices.

Mr. Weiss did not attend. Mr. Gusman and Mr. Schwebel did. We decided to raise the prices by whatever number it was. I don't remember the num-

voice toward us. You seem to have a conversation between yourselves and we don't here. Talk a little louder too. You have a tendency to talk between yourselves.

THE WITNESS: It is difficult to listen here and answer there.

JUROR NO. 2: I hope I am not out of order, but I am trying to get what I can out of this.

THE COURT: If anybody has any difficulty with hearing they should follow your example and let us know.

MR. BURGESS: We are very glad you did. Thank you very much.

BY MR. BURGESS:

Q Now, did there come a time, Mr. Grafstrom, when you and Mr. Powrie had a further meeting with Mr. Schwebel and Mr. Nordheim?

A Yes, about two months later.

Q And where was that?

A That was a luncheon meeting at the XII Caesars Forum, or whatever it is called, restaurant.

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Q Now, could you tell us what transpired at that meeting? Who said what and to whom?

A Well, Mr. Schwebel again raised the question about the agreement not having been performed. Ther was a considerable discussion about the quality of the merchandise. Mr. Powrie said, "It was a lot of junk you had there in storage and it was worthless. I can't use it."

He referred to the Golden Gate Apartment project in San Francisco, where the same material had been hung and most of it had fallen apart in two months. And pointing to the two other people he said, "You two were out there and you know it's a pile of junk."

I think Mr. Nordheim's comment to that was, "Well, we know it was bad, we don't think it was all that bad."

Q Was there any reference to the other defendants in this case, J. P. Stevens and Burlington, at that meeting?

A Yes. Mr. Powrie said, "We know that you people are in constant communication with each other and we know that what you want to do is get our personal guarantees and then sink the company."

Q Did Mr. Nordheim or Mr. Schwebel reply to that?

A Mr. Schwebel said he had only talked to Mr. Kelley.

A No.

MR. HARDISON: Nothing further.

CROSS EXAMINATION

BY MR. McGANNEY:

Q You testified about a luncheon meeting in September with Mr. Schwebel and Mr. Nordheim?

A That is correct.

Q Can you state the date of that meeting?

A I don't remember the exact date. I think it was toward the end of September.

Q Do you recall Mr. Nordheim saying to you at that meeting that "We could work something out if we tried to be men of good will"?

A Yes, I think I do recall that and I think Mr. Powrie replied that, "Let's see some good will on your side."

Q Wasn't, in fact, something worked out in that meeting reducing Textura's payments to $5000?

A Yes.

MR. McGANNEY: I have no further questions.

REDIRECT EXAMINATION

BY MR. BURGESS:

Q Mr. Grafstrom, Mr. McGanney just referred to an agreement reducing the terms of the settlement of the dispute

ms23 Witness Sherwood Gumbiner

"A No."

Thank you.

MR. BURGESS: Page 45, line 21:

"Q Did you have any discussion with Mr. Wilson about methods of distribution of decorative fabrics?

"A Yes. I gave him my theories.

"Q What were your theories?

"A My theories were to sell through the jobbers, the established jobbers. And not sell any job direct. Or not even be in the contract business ourselves.

"Q Did you say why?

"A I just felt it was a way of distributing, getting the widest distribution of our product line."

MR. TOPKIS: (Reading:)

"Q Did he agree with you?

"A I don't recall whether he did or not.

"Q Do you recall what he said?

"A No, I don't."

Thank you.

MR. BURGESS: Line 21: -- Mr. Wilson is from the defendant Stevens --

"Q Did you have any discussion with anybody from Burlington about methods of distribution?

"A I'm sure that I had it with all three of four

ms24 "Gumbiner 14 1

suppliers.

"Q I'm trying to find out who you had such discussions with.

"A I'm sure it was Paul Erskine of Burlington and--

"Q Do you recall when you first --

"A And somebody else at Burlingyon, too, and I can't recall his name, who headed up the decorative division in, say, the spring of 1967. I don't recall. I only saw him once and I don't recall his name, when I was in New York.

"Q Do you recall if it was Sam Hughes?

"A I think that's the name, yes.

"Q When did you meet him in New York?

"A I don't know. I would have to go back and look, but it was some time after Textura -- I mean Soft-Flex was formed as a company.

"Q Do you recall what was said about methods of distribution at that meeting?

"A I'm sure I said the same thing because I believe it.

"Q Do you recall what he said?

"A No. I think their normal channel of distribution was that way, so I probably agreed with him, from the converter to the jobber. I don't really recall what he said. I saw him once in my life.

"Q What was the nature of your discussions with Paul Erskine on the subject of distribution methods?

"A I think Paul and I, Paul sold me a lot of industrial fabric and through the years I'm sure we had lots of discussions concerning it. And my feeling always was that if I were in the business, I would go through the jobber and of it. Whether I was wrong or right.

"Q Are industrial fabrics sold through jobbers for the most part?

"A I think industrial fabrics as a general rule are sold to the user, directly to the user. There is no distribution set up through jobbers on industrial fabrics that I know of in fiberglas.

"Q But there is for decorative fabrics?

"A Yes.

"Q Did you have any such discussions about methods of distribution with anybody at Clark-Schwebel?

"A I'm sure I did with Jack Schwebel and --

"Q Do you recall when you first had any such discussion?

"A No, I don't recall when the first disc ussions took place.

"Q Do you recall if you had any discussions with

employed at Clark-Schwebel?

A I was vice president and director of the corporate structure in charge of the Decorative Fabric Division.

Q Mr. Nordheim, did you have pricing responsibilities?

A Yes, sir.

Q What were they? What were your responsibilities in the pricing area?

A I would put the price on the fabric.

Q Did you ever have occasion to consult with Mr. Ray Clark of Clark-Schwebel,or Mr. Jack Schwebel, regarding the fixing of prices on fabrics?

A Would you explain "the fixing of prices on fabric"?

Q The arranging between yourself and your competitors of an established price for a fabric.

A At no time.

Q How would you go about establishing a price for a given line of decorative fabrics?

A Your name is Burgess?

Q Yes, sir.

A Mr. Burgess, there was no set formula.

Q Do you recall ever having discussed with Mr.

A They are curtain and drapery manufacturers.

Q Did you also sell to converters?

A Yes, sir.

Q Who were they?

A One was Rosen & Company or its subsidiary, Roscoe Fabrics.

Q Were there any other converters?

A Yes, Titus Blatter.

Q Did you also sell to the plaintiff Textura?

A Absolutely, or Glass Fabrics.

Q Now, is it not true, Mr. Nordheim, that you sold the bulk of your goods to manufacturers of curtains and draperies?

A Absolutely.

Q Now, you were of the opinion, were you not, that converters were unnecessary in the fiber glass industry, isn't that correct.

A No. In my deposition -- I can save you the trouble of looking for the -- I said they were a necessarily evil.

Q They were a necessary evil?

A There is a big difference.

Q Well, let me just look?

A Did you testify that manufacturers didn't

need converters?

A That is correct.

Q Thank you.

Now, was Mr. Clark your superior at defendant Clark-Schwebel?

A Mr. Clark was president of the company. I was vice president.

Q Was he your superior?

A Yes, sir.

Q And he died in October of 1964, isn't that correct?

A I believe that is correct.

Q Now, Mr. Nordheim, with reference to the death of Mr. Clark, was there any change in Clark-Schwebel's policy in dealing with its customers after Mr. Clark's death?

A Not necessarily, no.

Q Isn't it true that at that time you decided with Mr. Schwebel to run a little tighter ship, to tighten up on quality and to tighten up on credit?

A I don't believe you are correct. We didn't have to tighten up on quality. That was a standing, every-day procedure.

Q In so far as credit was concerned, we were

"A I'd say we all were. I was a party to it, Jack and, I presume, the other boys were"?

Also at page 90, line 20:

"Q Do you recall what specific changes you adopted with respect to the plaintiffs in this action?

"Mr.McGanney: I object to that" --

MR. TOPKIS: You don't need to read the colloquy; just the questions and answers.

MR. BURGESS: The question was changed to refer to all customers.

"The Witness: Across the board.

"Mr. Corbett: Right.

"A We tightened up on everything, like I said.

"Q On credit?

"A On everything.

"Q On quality?

"A Shipments, quality, credit, everything. The number of our people in our employ. Everything. We were out to make profit, cut our overhead, cut our cost."

Were you asked those questions and did you give those answers?

Now, did those complaints -- did they increase as 1965 went on?

A I am sorry, I don't recall.

Q Let me ask you this, Mr. Nordheim. Isn't it true that in terms of the volume of complaints from Textura as to the quality of fabric delivered by Clark-Schwebel,that these volume of complaints as compared with complaints made by your other customers, that you personally felt that Textura made an inordinately high amount of complaints as against your other customers?

A Yes.

Q They did. Substantially more, is that correct?

A I would not make that statement.

Q But they made more complaints?

A In proportion to the yards purchased.

Q In proportion to yards purchased they were a more substantial complainer than your other customers?

A Yes, sir.

Q Do you know a man named Louis Moskowitz?

A Yes, sir.

Q Who is he?

Q Now, you were primarily responsible for the handling of the account of the plaintiff Textura for the defendant Clark-Schwebel, were you not?

A I was responsible for the entire decorative operation of Clark-Schwebel Fiber Glass.

Q And that would include the account of the plaintiff in this case, Textura?

A That is correct.

Q You continued to handle this account for all the years that you were employed by Clark-Schwebel?

A That is correct.

Q You conferred, did you not, with these other persons we have referred to, Mr. Moskowitz and Mr. Janetschek of the defendant Stevens, and Mr. Kelley of the defendant Burlington from time to time concerning Textura's account, did you not?

A We conferred about it.

Q Did you confer?

A We conrerred.

MR. TOPKIS: About what?

Q You had occasion to talk to Mr. Kelley on 6/2/65, June 2nd, 1965?

A I'm sorry. The dates will have to be a problem.

Q Do you recollect that you placed a telephone

fulfill. That is the best copy we have.

Rather than waste the time of the court, your Honor, I will simply move on to something else.

Q Mr. Nordheim, referring to Plaintiffs' 91, I read you the third paragraph:

"He" -- that is you -- "also advised me" -- that's Mr. Kelley -- "that Lou Moskowitz of I. F. Dommerich & Company will be in California on 1/13 or 1/14 and Mr. Nordheim of Clark-Schwebel will also be there at the same time. Apparently, Nordheim is quite friendly with Lou Moskowitz and they intend to sit down together while in Los Angeles and discuss this account.

"Nordheim tells me the 50,000 which was overadvanced by Dommerich and which was to be paid back at the rate of $10,000 a month is in default, and that Moskowitz tells him they are not giving the account any more money until after the turn of the year."

How did you know that this $10,000 a month was in default? Did you know that for a fact?

A I have to presume I got the information from Mr. Moskowitz in the normal interchange of credit information, but I don't know.

Q Did you check with Mr. Powrie to see whether that was correct?

A I don't recall whether I did or did not.

Q Referring to the second paragraph of Exhibit 91 again, did you know for a fact that there was an account receivable of 50,000 due from the Civic Center which was long past due?

A I can't say I knew it for a fact, but if I said it as it is recorded in Mr. Kelley's internal memorandum I wouldn't have told him anything that was untrue.

Q Did you know for a fact that it was long past due?

A I have to presume that that is true.

Q Well, isn't it true that you also knew at the same time that there was negotiations under way for you to supply paid invoices for the Civic Center, for Textura to collect from the Civic Center, and in fact they couldn't collect because of this requirement of the Civic Center.

A I am not playing games with you, Mr. Burgess. I am answering as I know it to be so. If I don't know it I am going to tell you so. I have answered you as I know best.

(Plaintiffs' Exhibit 96 was received in evidence.)

THE WITNESS: I can't get anything out of that.

MR. BURGESS: If you will permit me I will read it to the jury.

(Mr. Burgess read to the jury from Plaintiffs' Exhibit 96 in evidence.)

BY MR. BURGESS:

Q Is that an accurate record of the conversation you had with Mr. Kelley?

A I believe it to be true. I can't guarantee it.

Q At this time, on or about January 17, you visited the offices of Textura, did you not?

A Oh, yes.

Q And you inspected some fabric there, did you not?

A At that time. I am not sure if I did at that time, but I inspected fabric on their premises.

Q And you expressed about certain of this fabric in rather strong language that it was not good quality, isn't that correct?

A Oh, I remember that one. Yes, very

positively.

Q Thank you.

Now, in March of 1966, do you recollect, Mr. Nordheim, that you sent Textura a letter whereby you invoiced Textura for all the goods which Clark-Schwebel was holding in its warehouse?

A Let me see it.

Q Suppose I state to you in March of 1966 Clark-Schwebel did invoice Textura for goods which was held in its warehouse and at the same time -- will you excuse us for just a minute, your Honor?

(Pause.)

Q I show you a statement dated 2/28/66. Do you recollect that on or about that time you submitted invoices to Textura for all of the goods which Clark-Schwebel was holding in its warehouse?

MR. MC GANNEY: Mr. Burgess, there is an exhibit in evidence, 108, which is a copy of the letter.

MR. BURGESS: Thank you very much.

A Now, will you pose your question?

Q At this time did you submit invoices to Textura for all of the goods which Clark-Schwebel was holding in its warehouse?

A I don't know. It only refers to eight invoices. Whether that covers it all or not I don't know.

Q Mr. Nordheim, you don't recall at all the events of March, 1966 at this time?

A For clarification, you are talking about a specific date. I am talking about invoicing for all the goods. I don't know whether all the goods were invoiced on March 8th or March 4th or March 10th.

Q Well, on or about.

A At some time in 1966 I believe we did invoice every blessed yard, including yarn.

Q All right. And that was in or about March of 1966, isn't that correct?

A I will not make that statement, I don't know.

Q Well --

A I can only tell you what I know.

Q I am asking for your recollection, Mr. Nordheim. Do you recall that in or about March of 1966 you put Textura on a cash basis?

A I remember we put them on a cash basis.

Q You don't recall whether it was March of 1966 or not?

A No, sir, I do not.

Q Do you recall that you refused to accept further orders from Textura on or about March 4, 1966?

A Uh huh. This letter very carefully says something contradictory to that.

Q It says:

"In light of your letter of February 24th and our reply dated March 1st, we are presently holding these in abeyance."

A That is not a refusal.

Q Well, I will just stand by what the letter says, Mr. Nordheim?

A Okay.

Q Do you recall that on June 9th an arbitration was instituted by Clark-Schwebel?

A I remember we instituted arbitration proceedings. Whether the date is correct, I don't know.

Q Let me ask you if on June 8th -- it is in evidence that the arbitration was commenced on June 9th -- as it is in evidence that in March of 1966 Clark-Schwebel invoiced Textura for all goods and put Textura on a cash basis, so I will just tell you that.

MR. TOPKIS: That is all true, but why are you trying to get it out of the witness and wasting time?

Q Immediately prior to June 9, the institution of the arbitration, did you have another telephone conversation with Mr. Kelly? I show you Plaintiffs' 130.

A There is no date on this.

MR. BURGESS: I think the date is stipulated to be 6/8/66.

MR. HARDISON: So stipulated.

Q You can take it as true it is 6/8/66. It was chopped off in the Xeroxing.

Is that an accurate record of your conversation with Mr. Kelley?

A I think it's reasonable. I don't know for sure.

MR. BURGESS: I offer that in evidence.

MR. TOPKIS: No objection.

THE COURT: Received in evidence.

(Plaintiffs' Exhibit 130 was received in evidence.)

MR. BURGESS: I would like to distribute copies of this memorandum to the jury.

Q Mr. Nordheim, with reference to this memorandum,

you advised Mr. Kelley that Textura had been a very difficult and contentious account, constantly making small claims which he rarely, if ever, was able to substantiate.

Then you refer to your examination of the Golden Gateway claim, the Spartan claim, and you say that Mr. Powrie admitted that the drapes were made skimpy.

Now, when did Mr. Powrie make this admission to you?

A I don't know.

Q Was it prior to the time you visited the Golden Gate?

A Mr. Burgess, there is a detailed report on that visit, and if we could get that report I could perhaps respond. If I don't have that, I cannot.

Q I will show you the report you wrote, Mr. Nordheim, which is Defendants' 686 for identification, and I would ask you to look through that report and tell me in that report where you find that Mr. Powrie admitted that the drapes were made skimpy.

MR. TOPKIS: The report either speaks for itself or it doesn't.

A Mr. Powrie was not present at that. In

fact, we had quite an issue on that subject because of the amount of the complaints made and he not showing up.

Q So this alleged admission by Mr. Powrie couldn't have been prior to that time?

A No, no, no, I don't know when that was said, if it was said; but if I did attest to it, then it must have been at some time true. I don't know.

Q Thank you Mr. Nordheim.

On June 30, Mr. Nordheim -- I will just save you time and hand you Plaintiffs' Exhibit 141.

I think it is clear the date on this memo is 6/30/66. It's been chopped off.

I ask you to review that memo and ask if it is an accurate record of a conversation that you had with Mr. Kelley.

I refer to paragraphs 3, 4 and 5.

A I will respond individually. Paragraph 3 is correct.

Paragraph 4 doesn't sound out of line.

Paragraph 5 is a bugaboo.

Q Di you find something in that paragraph that is incorrect, that does not accord with your recollection?

A Yes, the last sentence is not clear to my memory, namely:

"In the meantime, it would appear that Textura, Limited is no longer the representative in this country."

I don't recall where it came from. But it must have come from some piece of old cloth somewhere. As far as the rest of the sentence is concerned, yes, I did say that the process was worthless.

Q You did say that "C-S indicated that they would not be interested until they co uld get a letter of indemnity holding them harmless in the event Textura takes any action with regard to the cancelation of the arrangement."

So Clark-Schwebel was interested in obtaining this process, was it not?

A I refer you back to your own piece of evidence, namely, the letter of February, 1965, and that letter indicates the interest of Clark-Schwebel Fiber Glass.

Q But as of this date, June 30, 1966, when you state in your memo that:

"The owners of this process have advised him that

they have canceled their arrangement with Textura and they are now offering the sole representation to C-D," --

A I never in my career have spoken with anybody having to do with the Varomi interests, who had the process. I personally have never spoken to anybody in that operation.

Q So this is not correct?

A It would appear not to be. That is the reason I am confused.

Q Now, is it not true, Mr. Nordheim, that subsequent to June 9, 1966, the time the arbitration was instituted in this action, you spoke to Mr. Kelley more frequently than you had prior to time it had been instituted? Isn't that correct?

A I'm not prepared to make such a statement, no.

Q May I refresh your recollection by referring to your deposition, page 171?

A Maybe I can help you if you're referring specifically to this particular account, yes.

Q So it's true that you did call Mr. Kelly on this account more frequently at the time you were instituting arbitration?

A When you're in trouble what do you do? You

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protect yourself.

Q I am asking you a question yes or no?

A I can't answer it yes or not.

Q You say when you are in trouble you protect yourself? Thank you. And protecting yourself was making telephone calls to Mr. Kelly? That was one way of protecting yourself?

A No.

Q Do you recall that on or about July 6, 1966, you had a telephone conversation with Mr. Powrie in which you discussed certain terms at which the arbitration might be settled? And I refer you to a memorandum, Plaintiffs' Exhibit 145 in evidence, and ask you if you recall whether you suggested those terms to Mr. Powrie as a basis for settlement of the arbitration?

A No, sir, I do not.

Q I show you a mmemorandum dated July 6, 1966. See if that refreshes your recollection as to a phone conversation with Mr. Powrie?

A Now would you pose your question?

Q Do you recollect, referring to the first page, that on Tuesday, July 5, you called Mr. Powrie and presented him a proposal which you and Mr. Schwebel had agreed upon?

A It says so in the first paragraph.

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Q I'm asking you, is that correct?

A True.

Q Now, you offered to Mr. Powrie the settlement that was suggested in the second paragraph? Isn't that correct?

A True.

Q It's also correct that Mr. Powrie advised you that he could ot pay that kind of money and not in the increments which you suggested?

A True.

Q Which was $25,000 in July, and approximately the same amounts in three subsequent months?

A That is what it says. It's true.

Q I show you Plaintiffs' Exhibit 148 and ask you if it's not true that on July 8, 1966, you called Mr. Kelley to report on that conversation with Mr. Powrie?

MR.McGANNEY: Shouldn't we mark that as a document for document?

THE COURT: Mark it for identification.

(Plaintiffs' Exhibit 876 was marked for identification.)

MR. BURGESS: I would offer that in evidence.

MR. TOPKIS: Which one?

MR. BURGESS: 148.

MR. TOPKIS: No objection.

(Plaintiffs' Exhibit 148 was received in evidence.)

Q Mr. Nordheim, with reference to Plaintiffs' Exhibit 148 -- do you have it in front of you -- on July 8, 1966, which is shortly after you spoke to Mr. Powrie you advised Mr. Kelley of the terms you had discussed with Mr. Powrie and you also advised Mr. Kelley that Mr. Powrie stated that the terms suggested by you were impossible?

A My memorandum so states.

MR. BURGESS: Your Honor, I wonder whether this is an appropriate time to take a recess?

THE COURT: All right.

(Short recess.)

BY MR. BURGESS:

Q Mr. Nordheim, when we left off we were discussing a communication which you had with Mr. Kelley on July 8, 1966, Plaintiffs' Exhibit 148.

Now, subsequent to that time, on July 29, 1966, you and Mr. Schwebel had a meeting with Mr. Powrie and Mr. Grafstom? Is that correct? I don't have document, sir. I am asking you for you recollection.

A I know we had a meeting. I don't know if it was the 29th of July or not.

Q If I represent to you it was the 29th of July at

the St. Regis Hotel?

A Yes, I remember the St. Regis, but I don't remember the date.

Q I am representing to you that it was July 29 and that is in evidence.

Now, on July 26, 1966, you had a further communication with Mr. Kelley, did you not, and I refer you to Plaintiffs' Exhibit --

A Prior to this you said July 29.

Q The St. Regis agreement was July 29. The date of this memorandum is July 26. Does that refresh your recollection as to a conversation you had with Mr. Kelley on or about that date?

A I say it reflects the facts.

Q It is an accurate record of that conversation?

A I would think so.

MR. BURGESS: I offer it in evidence.

MR. McGANNEY: No objection.

(Plaintiffs' Exhibit 158 was received in evidence.)

MR. BURGESS: Your Honor, we would like to distribute copies of this to the jury.

(Copies of Exhibit 158 given to the jury.)

Q Mr. Nordehim, this was on July 26, 1966, that

you made this call? Is that correct?

A The report is dated July 26. I don't know that that is so, that I called on that date.

Q Would it be on or about that date?

A Approximately.

Q You stated to Mr. Kelley, and I am reading from the second paragraph:

"Mr. Nordheim states that he is very anxious to avoid arbitration and would prefer to obtain a settlement with this account, but if they insist on going through with arbitration they feel confident that they can win, and, of course, if they -- and that means Clark-Schwebel -- win the arbitration they would no longer be in a mood to compromise and would insist on immediate payment, which may very well bankrupt this account."

You told Mr. Kelley that, did you not?

A I think that is very probable.

Q You did tell him that?

A I think that is very probable.

Q And that is three days to the date you were having the settlement discussions with Mr. Powrie?

A Yes.

Q Mr. Nordheim, are you familiar with a person

Q You testified, I think, that you on one occasion, at keast, conferred with Mr. Moskowitz, Mr. Janetschek, and Mr. Kelly, and you answered a question for Mr. Burgess by saying, "Yes, I conferred."

I want to ask you, did you mean by that that on occasion you talked with these people?

A Excuse me, sir, I'm not sure of this, but I believe, and I am sure you have the record of it, sir, that I said that I did not or do not recall speaking to Mr. Janetschek.

Q I see. But you did speak with Mr. Moskowitz?

A Yes, sir.

Q And Mr. Kelley?

A Yes, sir.

Q You spoke with Mr. Kelley about Textura?

A Yes, sir.

Q On occasion?

A Yes, sir.

Q Did you ever speak with Mr. Kelley about any other accounts?

A Yes, sir.

Q Often?

A The volume of business we did didn't require it because most of our accounts were AAA-1, very fine credit

risks, so we had very little to talk to people about, except when it was a question of how they stood.

Q Do I understand, then, whenever there was a problem with an account of yours in the decorative glass fiber fabric business it was your regular practice to discuss that account with other people whom you knew also to be selling?

A Unequivocally so.

Q Regularly?

A Yes, sir.

Q Whenever it happened?

A Whenever.

Q And you did that with Kelley?

A Yes, sir.

Q Did you do it with anybody at Stevens?

A No, sir.

Q Did you do it with anybody at United Merchants?

A No, sir. I may have spoken to Mr. Maurice Fisher, but I'm not sure.

Q At United Merchants?

A Yes, I may have, but I'm not certain.

Q Do I understand, then, that there was nothing unusual about the way you dealt with Textura?

A Excuse me, I would not have spoken to United

Merchants because we rarely competed with one another in so far as customers that we followed.

Q But there was nothing unusual about the way you dealt with the Textural account?

A I'm sorry, that is not so. We bent over backwards with this particular account, and it is the only account we bent over backwards with, to acccmmodate and help him. We didn't have these kind of problems with any other account, even those in the same business.

Q You sold to other people in the same business as Textura?

A Yes, sir.

Q And you didn't have the same kind of credit problems with them?

A No, sir.

Q But when you did have credit problems with any account it was your practice to discuss those credit problems with other people who might have been having similar credit problems?

A Yes.

Q As a kind of defensive measure?

A Yes, sir.

Q You had conversations with Mr. Powrie from time to time?

Is that the fact, sir?

A It would appear so.

Q So you were waiting to hear from Mr. Powrie, you didn't, and you went ahead?

A That is correct.

Q Another one of these documents, 158, I think it is, quotes you as being "very anxious to avoid arbitration."

Were you very anxious to avoid arbitration?

A Absolutely. We were hoping to see that the operation could stay in business, because we thought it had a great potential.

Q And you wanted to sell the merchandise?

A Absolutely.

Q Did you ever have the desire, plan or purpose to put Textura out of business?

A Sir, that's as far from the facts as could possibly be.

MR. TOPKIS: I have no further questions. Thank you.

CROSS EXAMINATION

BY MR. MC GANNEY:

Q Mr. Nordheim, did there come a time you went

MR. MC GANNEY: That's what we are offering it for.

THE COURT: Let him refresh his recollection. I think that's the best way. When the hearsay questions present themselves they can be ruled on.

Was a copy of this report ever furnished to Mr. Powrie?

THE WITNESS: I don't know, sir. I wouldn't think so.

Q When you went to San Francisco, was Mr. Powrie there?

A No, sir.

Q Were you informed prior to going to San Francisco that Mr. Powrie was not going to be there?

A I expected to meet him.

Q You expected to meet him in San Francisco?

A Yes.

Q And when you went to the Golden Gateway, he wasn't there?

A No, I went to Mr. Johnson's office, who was the representative at that time of Mr. Powrie, and he told me at that time that Mr. Powrie had to go some place or was called away or something, and he

ment.

MR. BURGESS: I beg to differ.

THE COURT: Go ahead, please, Mr. Nordheim. Don't read from the document. He's got to read it to refresh his recollection.

MR. BURGESS: I understand that, you-r Honor, but he has read it.

A. On behalf of the Clark-Schwebel Fiber Glass Corporation I wrote this memorandum and I responded by saying in my conclusions -- and there is a section called "Conclusion" -- that the cloth was satisfactory, that there was an unsatisfactory installationand there was poor manufacture.

Now, if I read the rest of it I will make certain that is what my memory says, but I am not positive. But I do know, I do know, that I maintained that Mr. Powrie had made a mistake somewhere, and it was not in the quality of cloth that I had shipped to him or to his sewing plant.

Q Was that your honest evaluation of the situation at the Golden Gateway, Mr. Nordheim?

A Mr. McGanney, it was not only my opinion but the people who were there, but that's hearsay.

MR. BURGESS: Objection.

in sunlight control at the window.

Q Did you ever have occasion to meet with Mr. Powrie in Pittsburgh with respect to this Engineer's Guide?

A Yes, sir.

Q Can you explain how that came about?

A I can't explain how it came about, no.

Q Who was at the meeting?

A Mr. Powrie and I were there. I believe Mr. Kaye, who is now deceased. I don't recall who else but there were people of the Pittsburgh Plate Glass Company present.

Q What was discussed at that meeting?

A The importance of this document and some financial assistance.

Q Do you know as a result of that meeting whether there was financial assistance given?

MR. BURGESS: We will concede that. It's been introduced through Mr. Schwebel, the credits were introduced.

MR. MC GANNEY: This is something in addition to the credits, Mr. Burgess.

A Will you repeat your question, please.

(Question read.)

A Yes, sir.

Q What was that financial assistance?

A I believe, and I can't be certain of this without checking files -- I believe that we got Pittsburgh Plate Glass to assist in the cost of this in the sum of 15 or 20 thousand dollars. I can't be positive of the facts, but there was assistance.

Q That was from Pittsburgh Plate Glass?

A Yes, sir. We were a customer of Pittsburgh's.

Q Mr. Nordheim, there was testimony that after Textura went out of business Clark-Schwebel made certain sales to Softflex, is that correct, or to Menardi?

A I was not certain of that question, Mr. McGanney. I suggest that somebody present facts.

Q I show you Plaintiffs' Exhibit 542 and I ask you if you can identify those contracts.

A Yes, I can identify every one of them. I can't tell you what each fabric is, but I recognize the contracts, and I signed them.

Q Were those sales of Textura styles?

A The first one is.

Q Would you identify the date?

A Contract dated June 19, 1968, for four

A Is that earlier.

Q Now, incidentally, Clark-Schwebel finished the fabric that went into the Golden Gateway, did they not?

A I believe so. I am not certain. An awful lot of the goods were finished at Mr. Powrie's request on the Coast.

Q The goods that went into the Golden Gateway you believe were finished by Clark-Schwebel?

A I think so.

Q Mr. McGanney also asked you about financial assistance by Pittsburgh Plate Glass Corporation to the Engineer's Guide. That financial assistance was provided by Pittsburgh Plate Glass,not Clark-Schwebel, correct?

A The money came from PPG, but we had something to do with it.

Q Mr. Topkis asked you certain questions concerning Plaintiffs' Exhibit 158 in which you state in the first paragraph that you told Mr. Powrie -- and you were communicating this to Mr. Kelley -- you told Mr. Powrie that they, Clark-Schwebel, were not out to put him out of business. So there was a question at this time they might go out of business as a result of

actions taken by Clark-Schwebel, isn't that correct?

A That was your statement.

Q I am asking you, isn't that correct? There was a question in your mind as to whether they could stay in business?

A There was a question as to whether they could financially handle the situation.

Q Meaning the situation with Clark Schwebel?

A Yes.

MR. BURGESS: No further questions.

RECROSS EXAMINATION

BY MR. TOPKIS:

Q I have just one question. Mr. Burgess just asked you, or didn't quite ask you, how it was that you came to go to the Golden Gateway. I will ask you. How did you come to go to the Golden Gateway?

A This was a customer we were anxious to see continue. This was a situation which we did not agree on as to the contentions of the customer. In turn, the customer made sufficient conversation about it that we felt it was our responsibioity, if we were going to resolve the claim, that we see what it was and not have a third party do it. For that reason, I not only went but I arranged with the fiber producer,

who produced the fiber that went into the fabric that we bought and made for Mr. Powrie, to appear there as well as the people from the Golden Gate to find out the facts.

Q Who was the fiber producer, sir?

A Owens-Corning.

Q So you had somebody from Owens-Corning come also to take a look, right?

A That is correct.

MR. TOPKIS: Thank you.

BY MR. MC GANNEY:

Q Mr. Nordheim, I show you Plaintiffs' Exhibit 118, which is a letter of May 6, 1966, addressed to you and signed by Mr. Powrie with several attachments.

I direct your attention to the third page.

A What about it?

Q I refer your attention to, under "Job Name," the name Perini appears. Is that the Golden Gateway job?

A I don't know, but I see in the covering letter that it says:

"Has not yet replaced the Perini job (Golden Gate Apartments),"

CARLYLE MICHELMAN, Trustee of Textura, Ltd., in Bankruptcy Proceedings, et al.

vs. 55 Civ. 4230

CLARK-SCHWEBEL FIBER GLASS CORPORATION, et al.

New York, October 31, 1974;
10.00 o'clock a.m.

(Trial resumed.)

(Jury in box.)

MR. BURGESS: At the present time I would like to call Mr. Lud Vollers to the stand.

L U D W I G L. V O L L E R S , J R . , called as a witness by the plaintiffs, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. BURGESS:

Q What is your present occupation?

A I am vice-president of Louis Hand & Company and Savoy Drapery Company, Divisions of Aberdeen Manufacturing.

Q That is in the textile industry, is it not?

A Yes, it is.

Q Was there a time that you were employed by the defendant Burlington Industries or Hess-Goldsmith, Division

of Burlington Industries?

A Yes.

Q When was that?

A Commencing 1956 through 1970.

Q Could you tell the Court and jury what positions you held with Hess-Goldsmith form '56 through the end of 1966?

A I started in '56 as a salesman with the company, became sales manager in 1962, vice-president in 1966, executive vice-president in 1967, and president in '68.

Q What was your position if we can just confine it in the years '64 through '66?

A I would have been sales manager of the decorative division.

Q Of the what division?

A Of the decorative division.

Q What were your principal duties and responsibilities in that position?

A Formulating merchandise plans, assisting in styling, product development, and establishing prices and so forth.

Q During that period to what executive of the defendant Burlington Industries did you principally report?

A William Colton.

Q What was the position of Mr. Colton at that time?

A At that point in 1964 Mr. Colton was the vice-president and by 1966 he had become president of the division.

Q Going back for a moment in 1962, beginning at the beginning of '62, you were sales manager at that time?

A Yes.

Q What was Mr. Colton at that time?

A He was president.

Q What were the responsibilities and duties of Mr. Colton as vice-president, if you know?

A General administrative management of the division.

Q What division are we talking about?

A We are talking about the decorative fiber glass division, approval of merchandise plans; I would say general administrative management of the division.

Q This was in '62?

A Yes.

Q Did there come a time that Mr. Colton adopted a position which would give him responsibility for both decorative and industrial fabrics?

A When Mr. Colton was named president of Hess-Goldsmith he had responsibility for both divisions.

Q Prior to that had he any responsibility in the

industrial area?

A Prior to that time he was executive vice-president. I would say his duties were twofold at that time, too.

Q Is that in 1962 he had responsibility for both decorative and industrial fabrics? Is that correct?

A Yes.

Q Mr. Vollers, do you know a man named Paul Erskine?

A Yes.

Q Can you identify him for us?

A Paul Erskine was the West Coast agent for Hess-Goldsmith & Company.

Q Was there a time that Mr. Erskine himself acted as a salesman?

First, what period of time did Mr. Erskine act as a salesman?

A To the best of my knowledge he was selling the entire time he was associated with the fiber glass product.

Q And that would include after formation of his company, Erskine-Johns Company?

A Yes.

Q There was a time when Mr. Erskine acted as a salesman himself for Burlington, was there not?

A Yes.

Q And subsequent to that time he formed a company called Erskine-Johns Company and the company acted as a sales agent for Burlington?

A Yes.

Q Both the time that Mr. Erskine himself was a salesman and subsequent to the formation of Erskine-Johns Company accounts did they service?

A The principal account that he was servicing in the area was the Glass Fabrics Company. He also handled possibly one or two curtain companies. I know of one, Sunshine Curtain. He may have been asked to do other things, but those are the two basic accounts he handled in decorative.

Q That would be Glass Fabrics?

A Yes.

Q Did he subsequently handle Textura?

A Yes.

Q To whom did Mr. Erskine report in the Burlington hierarchy?

A For administrative purposes he reported to Mr. Colton.

Q And subsequent to the formation of Erskine-Johns Company did he also report to Mr. Colton after that?

A I would not say he reported to him. He negoti-

A When he had that responsibility I certainly would assume that.

Q Did you have any discussions ever with any of your competitors concerning what might be called identification of fiber glass fabrics?

A Identification?

Q Well, does that term mean anything to you?

A Just out of context, no. Can you refer --

Q Well --

A Go ahead.

Q -- when you manufactured a style of decorative fabric did you have any understanding with any of your competitors that they would stay away from that style?

A Not an understanding with the competitor. The understanding on making a confined style was really with a customer. We assured the customer we wouldn't make that same styoe or anybody else. Normally, our customer would -- because the industry was quite small, only three major producers in decorative -- the customer would be more or less responsible to be sure that one of the other glass fabric suppliers didn't make a similar style.

It was not unheard of for one mill to

Q They didn't sell them direct to construction sites?

A They did that too. They also sold to jobbers. And they sold to contract jobs.

Q In your opinion, Glass Fabrics and Textura did not distribute in the normal, traditional mode of distribution, isn't that correct?

A Well, I think that -- I wouldn't say not normal or -- glass fabrics had a very unique position in the sense that they were probably the truest converter we did business with. If you go to the definition of the word "converter," it is just what it says. A converter is somebody who takes fabrics in the greige or unfinished and finishes them and resells them, and the only customer we had who did this was Glass Fabrics. They did their own finishing.

Q Did they differ from the balance of your customers, Mr. Vollers?

A Balance?

Q In that respect. Weren't they different in that they both converted and sold directly to the contractor?

A Yes.

Q That was different?

A It was only different in the sense that they were --

Q Was it different?

MR.TOPKIS: Let the witness answer the question.

A It was not different in the sense that they sold to the contract job or sold to jobbers. It was different in the sense that they purchased Greige goods and did their own finishing. That no other customer did,

Q In other words, they both converted the fabric and sold directly. Isn't that a basis for a distinction?

A They also bought finished goods from mills. So --

Q Let me ask you this, Mr. Vollers; Did Textura or Glass Fabrics' activities cause any complaints from other customers of Burlington Industries?

MR. TOPKIS: Objection. Causation is utterly unknown.

THE COURT: Yes.

Q Did you receive complaints --

THE COURT: You can ask if he received any specifically stated.

Q Did you receive complaints from other

customers concerning Textura's selling methods?

A Not against their selling methods, no.

Q Did you receive complaints about Textura from any?

A Yes.

Q What form did those complaints take?

A The very uniqueness of the distribution, or the very uniqueness of Glass Fabrics' operation. The fact that they were able to buy goods in the raw state and process them themselves appeared to some of our competitors as being an advantage that Glass Fabrics had over them, and they questioned our distribution along these lines.

MR. TOPKIS: Excuse me. Did the witness misspeak himself, as I suspect? He spoke of our competitors. Did you mean Glass Fabrics' competitors?

THE WITNESS: I am sorry. Glass Fabrics' competitors.

Q And you did, I note, when you gave your answer, mention distribution, so it was Textura's distribution that was causing these complaints, is that correct?

A No, I am sorry. Then I also have confused you. When I say distribution I am talking about the

I think you would have to say that, yes.

Q Fine.

Now, there were a substantial volume of complaints, were there not, Mr. Vollers?

A No. Of course, I am not quite sure what "substantial volume" means.

Q Who did you receive complaints from?

A Glass Fabrics' closest competitors, in that case Thortel, Qual-Fab, this sort.

Q What volume did Burlington Industries do with Qual-Fab?

A In that period I'll guess -- '62 to '64, I would say it was building rapidly in the area of 3 to 4 million dollars a year.

Q What volume did you do with Textura?

A 300 to 400 thousand dollars a year.

Q Substantially less?

A Substantially less, yes.

Q So then you were receiving complaints from a 3 or 4 million dollar customer of yours, and did you discuss these complaints with Mr. Colton?

A Yes.

Q And these complaints were building rapidly, you say?

A No.

Q Did Mr. Colton advise you to do something about these complaints?

A Yes.

Q Do you know if Mr.Colton discussed these complaints with anybody at Clark-Schwebel or Stevens?

A No, I don't know.

Q Do you know if Qual-Fab was a customer -- did Thortel also complain?

A I believe so, but I'm not sure.

Q Did you know that Qual-Fab and Thortel were customers also of the defendant J. P. Stevens?

A Yes.

Q Mr. Vollers, during the period 1962 through 1966 did you personally participate in the handling of the account of Textura?

A Yes, to the extent that I was called in to discuss problems that were beyond the province of the sales representative.

Q Did there come a time when you became more intimately involved with the account than you had in the past?

A Yes.

Q When was that?

A The summer of 1966.

Q And this was when, in fact, the relationship of Textura and Burlington arrived at a critical period with respect to quality, did it not?

A Yes.

Q And in fact, at this time there was what you might characterize as a never-ending series of quality problems between Burlington and Textura?

A Yes.

Q And in some cases Burlington found it was virtually impossible to deliver quality goods to Textura, was it not the case?

A That's correct.

Q Now, you had a meeting with Mr. Powrie on June 2, 1966, did you not?

A Yes.

Q The subject of this discussion was the quality problem between the two parties, was it not?

A Yes.

Q You discussed at that meeting Crown and Satin Boucle, did you not?

A Yes.

Q There were open contracts in existence on both those two styles, were there not?

A I believe there were.

Q Now, at that meeting or prior to that meeting Mr. Powrie had made a proposal to you regarding the handling of these quality problems, had he not?

A My memory is going to fail me. I don't know whether it's prior to that meeting or at that meeting. I'm sorry.

Q Let me show you a memorandum, Plaintiffs' Exhibit 227 for identification, and ask you to identify that.

MR. HARDISON: What is the date on that?

MR. BURGESS: The date on it is 1-10-67.

Q Does that refresh your recollection?

A Yes.

Q You, in fact, rejected Mr. Powrie's proposal, did you not?

A Yes, sir.

Q Mr. Vollers, this quality problem persisted after the meeting?

(Defendants' Exhibit AO was marked for identification.)

Q Mr. Vollers, will you look at Defendants' AO for identification.

Do you recall receiving a copy of Defendants' AO for identification?

A Yes.

Q Would you identify that document for the record, please?

A This is a status internal memorandum covering the status of, I suppose, every contract that was either open or contemplated with the account Textura.

The memorandum was a summary written by Paul Erskine to the salesman of the account, Ernest Gottschalk.

Q What is the date of that document?

A 5-18-66.

Q Aren't you shown as a recipient of a copy of this document on its face?

A Yes.

MR. HARDISON: I offer it in evidence.

MR. BURGESS: I have an objection.

The question was whether Crown was in weaving in June, 1966, and this document is dated May. With that caveat I have no objection to it.

mill, but what we hope to do in this meeting is to set up some sort of proceedings which would make the entire quality problem a little more management, a little more palatable to the customer, and certainly one that could be handed internally at Hess-Goldsmith.

Q Were any steps taken to that end result at the June 2nd, 1966 meeting?

A I think basically we at that meeting decided that the next step had to be perhaps a quality audit, if you will, or a visit by our quality control manager to the Glass Fabrics plant on the West Coast to see just exactly what the grading situation or grading standards were at that plant.

Q But you did reject any suggestion by Mr. Powrie that he have the sole say so with respect to whether the fabrics were of suitable quality?

A Yes.

Q Do you recall any conversations with Mr. Powrie or meetings with Mr. Powrie after June 2nd, 1966?

A I personally had no personal meetings with Mr. Powrie that I recall. He may have come to New York and stopped by the offices and I saw him. I don't know. I don't recall. There was at least one telephone call that I know of. I doubt if there were more.

Q Do you recall receiving any letters from Mr.

Powrie after the June 2nd, 1966 meeting?

A There was probably correspondence.

(Defendants' Exhibit AP was marked for identification.)

Q Could you identify that document for the jury?

A Yes, this is a letter from Textura to me, from Mr. Powrie, dated June 6, 1966.

Q Do you recall receiving a copy of that letter?

A I recall receiving the letter.

MR. HARDISON: I offer it in evidence, your Honor.

THE COURT: Received.

(Defendants' Exhibit AP was received in evidence.)

MR. HARDISON: With your Honor's permission I would like to read this short letter to the jury.

(Mr. Hardison reads from Defendants" Exhibit AP in evidence to the jury.)

Q Mr. Vollers, there is a handwritten note across the bottom of that letter. Could you identify that writing?

A Yes, it is mine.

Q What does it say?

A "EG: Note, Do Not Underline. Put In No Orders."

Q Who is EG?

A Ernest Gottschalk.

Q How did that note come about?

A As vice-president of the company upon receiving a letter from a customer stating that there would be a cessation of business, so to speak, or, let's say, a cessation of new orders until a certain problem is resolved, it behooves me not to produce a lot of very, very expensive goods with the possibility that these goods might not be taken by the customer.

Q And you did stop mill orders?

A I gave instructions for mill orders to be stopped. I gave those instructions.

Q Now, some time after the receipt of this letter -- the letter is dated June 6, 1966, I believe -- some time after receiving that letter did you have further conversations with Mr. Powrie on the telephone with respect to quality procedures?

A I can recall basically really only one pertinent conversation regarding the quality situation.

Q Which situation are you referring to?

A Just the broad quality problem of how it could be resolved so we could continue to do business.

THE COURT: Is this a telephone call you're talk-

ing about?

THE WITNESS: Yes, sir.

Q Did there come a time after June 6, 1966, when the weaving of Textura's fabrics continued?

A There was not a time after June that they did not continue. My recollection, and this is a tougghie, but I would say that we never really ceased production. What truly happened was that mill orders that had been placed for production might have been decreased wherever possible with the idea that we would not overproduce. But a loom is not something you just go in and turn off like a slight switch. It has got momentum and it keeps weaving, and I am sure we continued to produce those goods that were on the looms at that time.

Q Isn't it a fact, Mr. Vollers, that the sales department made a determination to continue weaving those fabrics even without credit approval?

A Yes.

Q Do you recall learning on or about August 10, 1966, of a conversation that Mr. Powrie had with Mr. Schutz in which Mr. Schutz was told by Mr. Powrie that Textura would be --

MR. BURGESS: Objection.

Is he being asked to testify to a conversation

MR. HARDISON: Your Honor, with your permission I would like to read the first paragraph of this document.

(Mr. Hardison read to the jury from Defendants' Exhibit AR in evidence.)

Q Mr. Vollers, do you recall Mr. Powrie ever communicating to you with respect to this memorandum?

A No.

Q Does this memorandum, to the best of your recollection, accurately reflect the status of Textura's contracts?

A Yes.

Q On September 2, 1966?

A Yes.

Q Isn't it a fact that as late as November, the last two weeks of November, 1966, the credit department approved a sales department recommendation for new contracts on Crown and satin boucle for 1967?

A Yes.

Q Mr. Burgess asked you a number of questions with respect to communications you had with the credit department of Burlington. Did Mr. Colton or Mr. Goldsmith or Mr. Clark, or anybody else in the Hess-Goldsmith Division, ever tell you to suggest to the

credit department that Textura's terms be restricted?

A Never.

Q Did anybody at Hess-Goldsmith ever tell you that they were interested in driving Textura out of business?

A No.

Q And you personally didn't have any interest or purpose in that regard?

A No.

Q Did anybody at J. P. Stevens ever suggest to you that you ought to try to get Mr. Schutz, or the Burlington credit department, to restrict Textura's terms?

A Never.

Q In fact, did you ever have any conversations with anybody in the Stevens credit department, to your knowledge?

A No.

Q And did anybody at Clark-Schwebel ever suggest to you that you try to get Textura's credit terms restricted?

A No.

Q Did you ever tell anybody in the Burlington credit department that you had had conversations

with anybody at Clark-Schwebel about Textura?

A No.

Q Mr. Vollers, does the Burlington credit department perform a credit function for all divisions of Burlington Industries?

A Yes.

Q Not just the Hess-Goldsmith Division?

A No, no.

Q And I believe you testified that the credit department is independent from the various sales departments?

A Completely. It's a corporate function.

Q Can you think of any reason in the world that the Burlington credit department would want to drive Textura out of business?

MR. BURGESS: Objection.

THE COURT: Sustained.

Q Finally, with respect to the complaints that were received, the so-called complaints from Qual-Fab, what did you do about those complaints?

A Discussed them with the account that had made them and resolved them on the basis of a logical explanation of the conduct of our business.

Q You took no action with respect to Textura

as far as those complaints were concerned?

A No, none.

MR. HARDISON: Nothing further.

MR. TOPKIS: No questions.

MR. MC GANNEY: I have no questions.

REDIRECT EXAMINATION

BY MR. BURGESS:

Q Mr. Vollers, referring to Defendants' AR, which has been introduced in evidence, this is from Paul Erskine and it says:

"It is my belief that certain understandings have been reached between Mr. Powrie and Mr. Schutz and that as a result of these understandings contract modifications have been written and we currently have five open contracts on five styles."

Now, you weren't there when Mr. Powrie and Mr. Schutz discussed these modifications, were you?

A No.

Q So that if Mr. Schutz told Mr. Powrie he had to agree to modify these contracts or he wouldn't continue to do business with him, you wouldn't know that, would you?

A I wouldn't know that.

Q Mr. Vollers, you also said that the credit

"Q At no time?

"A No.

"Q Did you ever have any discussions with any competitor of Stevens about the terms and conditions of sale for fiberglas fabric products?

"A No."

MR. BURGESS: "Q Did you ever have any discussions with any competitor of Stevens about decorative fiberglas products?

"A Decorative fiberglas -- just repeat the question.

"(The pending question was read.)

"A Yes.

"Q Do you recall with whom you had such discussions?

"A Vollers.

"Q At Burlington?

"A Yes. Ulnick at United Merchants. That's about it."

MR. TOPKIS: I want to read the rest.

"Q What about Jack Sc hwebel?

"A No.

"Q Did you have any discussions with Ray Nordheim?

"A No. They weren't a factor in the business.

"Q Who was not a factor?

"A Clark-Schwebel, in the decorative fabric business.

Q So prior to 1966 you hadn't been in fact with anyone at Burlington, is that your testimony?

A I don't believe I had, sir, no.

Q Mr. Knisel, in March of 1966 you became aware that there was a dispute existing between the plaintiff Textura and the defendant Clark-Schwebel, isn't that correct?

A No, sir, that is not correct. We did not learn of that dispute until some time early in July of 1966.

Q Did you give a deposition in this action?

A Yes, I did, sir.

Q Were you asked these questions and did you give these answers -- page 37, line 4:

"Q At some point in 1966, did you become aware that the plaintiffs were having a dispute with Clark-Schwebel?

"A Yes.

"Q Do you recall when you first became aware of that?

"A I believe around March or April"?

A Well, if I can correct that, sir, that was my recollection at the time, but I realized later the first opportunity we had to know of this dispute

actually to the point where it was going to arbitration was from Mr. Schwebel, and it was later in the year than July. If I knew anything prior to that time it was not in the nature of a serious matter. It was maybe a problem existing with Clark-Schwebel, or something like that.

Q So the first time you learned of this dispute was from the lips of Mr. Schwebel?

A That's to the best of my recollection, sir, yes.

Q Who did you learn this from? Did you learn this from Janetschek?

A Yes, sir.

Q And he learned this from conversations with Mr. Schwebel, correct?

A That's right.

Q To your knowledge, these conversations took place in early July of 1966, isn't that correct?

A I think in the first week or so of July.

Q I show you Plaintiffs' Exhibit 146 in evidence, Mr. Knisel, and ask you -- that's a record -- those are the conversations you are referring to of which that memorandum is a record, isn't that correct?

A Yes, sir, it appears to be our memorandum. Both of them.

Q So there were two telephone calls on July

Powrie went out of business.

A Yes, sir.

Q But you also testified that when he came to see you in November he was already, in effect, in bankruptcy?

A No, I didn't. I said that he was probably in a state of bankruptcy, but he was seeking a way out, and we were there to try and help him. He had two alternatives to get out.

Q Let me just ask you my question. If he is already probably in a state of bankruptcy, why then were you surprised that he went out of business?

A I frankly was because I thought that he could make some arrangements to stay in. Up until August of that year, as indicated in our meeting, he reported fairly good profits. There were two things against him. One was the arbitration with Clark-Schwebel, which he was seeking to put on a workable basis, and the other was a lack of a financing house.

Q You spoke also of the credit limitation -- let me pursue this a minute, Mr. Knisel. You said that when he came to you in November he was already substantially in bankruptcy, right?

A He was very distressed.

connection with the Textura account?

A In the Textura account I acted as an assistant to Mr. Binnie. My duties were mainly confined to keeping the file up to date, following up on the past dues, and once in a while I would write to Mr. Powrie for some statements.

Q Did there come a time when you had a conversation with Mr. Jack Schwebel, of the defendant Clark-Schwebel?

A Yes.

Q Was this in July of 1966?

A I know it was in 1966.

Q Let me show you, Mr. Janetschek, Plaintiffs' Exhibit 146 in evidence. That is a memorandum of your conversations with Mr. Schwebel, is it not?

A Yes. That has my initials.

Q And he telephoned you on both those occasions, did he not, as the memorandum states?

A Yes, he did.

Q Now, had you called him prior to that and asked for any of this information? Or did he just call you out of the blue?

A I had not contacted Mr. Schwebel for any information; he just called me out of the blue.

Q In fact, you had not heard from him before that?

A With regard to this account?

Q With regard to this account?

A Not that I can recall, no.

Q I would like to ask you a few questions about some of the statements in the memorandum.

At that time your account with Textura was in good shape, wasn't that true?

A In reading my first paragraph, yes, it was.

Q So you had no reason really to make any inquiry of Mr. Schwebel at that time?

A None whatsoever.

Q This was an unsolicited call from him?

A Yes, it was.

Q And Mr. Schwebel suggested to you that if you checked with your merchandise department you would probably have found that there was some yardage on order, but you didn't recall any large contracts? Is that right?

MR. TOPKIS: Are we going to go through this line by line?

MR. BURGESS: This is my last question.

A It is so stipulated here in my second paragraph.

Q So there was no large quantity of back orders of that time of Textura at Stevens?

MR. TOPKIS: Rather than doing this line by line, we have no objection to the memorandum coming into evidence.

MR. BURGESS: I think there is some hearsay. I will not offer it for the hearsay in it. There are hearsay statements in it by Mr. Moskowitz. I don't want to offer it for that reason.

MR. TOPKIS: We are going to get the whole conversation in, no matter what.

Q Did you advise Mr. Sandler at that time that Mr. Powrie was doing far better both sales and profitwise than you ever remembered him doing?

A I might have, because I think the last couple of statements we got in from Mr. Powrie looked far better than they had In previous years.

Q It was your opinion at that time that Mr. Powrie's account with you was in good shape?

A In September of '66? I don't recall if it was in good shape.

Q You said so to Mr. Sandler?

A The figures did indicate that he was doing better both on sales and on a profitwise basis.

MR. BURGESS: I have no further questions.

MR. SEIDEL: I would like to mark that last document as the next Defendants' Exhibit AT for identifica-

to do with figures as he had simplicate faith and confidence in the accountant who is on Textura's books. While he was out on the Coast he went over the Textura operations with his West Coast office and while he wouldn't divulge any further information told me that he had good and valid reasons for discontinuing the arrangement. He told me he did not want to give me the wrong impression but it basically boils down to the fact that Textura has pulled some things he does not like and he just cannot live with Mr. Powrie as he is too much of a headache account."

MR. BURGESS: If Mr. Seidel wishes to bring this up as part of his case, he can do so. But I only asked Mr. Janetschek about his conversations with Mr. Sandler.

MR. SEIDEL: Mr. Burgess referred to his letter and to this conversation with Dommerich and I think it's a proper subject for examination.

Q Is that what Mr. Moskowitz said to you?

A Basically that is what he said.

Q Was it a matter of concern to you that Dommerich was canceling its account, its factoring account?

A Well, it would be a matter of concern for us if they did cancel the account, certainly.

Q What was the basis for that concern?

A Well, if the account was left without a factor

they would not have anyone to check their credit for them, they wouldn't have the availability of the cash flow that was available to them in the past. They could not operate without a factor.

Q Did you ever learn that Dommerich, in fact, did extend its cancelation of the Textura account, and, in fact, never did cancel it even as of the day --

MR. BURGESS: Your Honor, this is not within miles of what I went into on direct. It has nothing to do with it.

Q Mr. Janetschek, going back to Plaintiffs' Exhibit 146 in evidence, do you have that before you, that is, your memos of July 6 and July 8?

A Yes.

Q I would like to ask you a few more questions about the Polyester Fiber Glass Group that you referred to on the second page of your July 8 memo.

How long had that group been in existence?

A That group was in existence when I came into this part of the department back in 1958.

Q It had been in existence many years as of 1966?

A I would estimate it had been in existence for approximately ten years.

A Yes.

Q But you never initiated a conversation with him?

A I would never take it upon myself to contact Mr. Schwebel for credit information on an account.

Q So that if you heard from him he was the one who called you?

A Yes.

Q Now --

A Mr. Schwebel was not a credit man. Mr. Schwebel was a salesman.

Q Precisely. Precisely. He was not a credit man.

A No. So I wouldn't contact Mr. Schwebel for credit information.

Q So it was unusual that he called you in the first place, wasn't it?

A Well, Mr. Schwebel had worked at Stevens for several years prior to forming Clark-Schwebel Fiber Glass Corporation, and knowing Mr. Schwebel it would not be unusual for him to call.

Q It would not be unusual for him to call?

A No.

Q But you had never heard from him prior to

after I came by Mr. Powrie.

Q When you went there you're referring to being employed by Glass Fabrics in 1960?

A Yes.

Q Do you know who L. F. Dommerich & Company is?

A Yes.

Q Who are they?

A They were the factoring company that we factored with.

Q To your knowledge did there come a time when L. F. Dommerich & Company gave Textura a notice of termination?

A Yes.

Q When was that?

A It was in the late summer or early fall. I don't remember just when.

Q Do you recall the circumstances under which you learned of the termination?

MR. TOPKIS: Objection. The letter of termination is in evidence. It is a known fact. There is no reason to test this witness' recollection about it.

MR. BREINDEL: The assumption of Mr. Topkis is that the notice of termination was in writing only.

MR. TOPKIS: If it wasn't, the writing is the

best evidence.

MR. BREINDEL: The writing is the best evidence of the writing. I am asking the witness about how she learned of the notice of termination and I'm trying to develop that.

THE COURT: Why?

MR. BREINDEL: To show that there was another reason. The writing simply states that the factoring agreement is terminated.

THE COURT: You can't prove it by hearsay.

MR. BREINDEL: I think we are dealing now with an admission of a co-conspirator. If I can approach the bench and make an offer of proof, your Honor.

(At the bench.)

MR. BREINDEL: If permitted the witness will testify that she was advised By Mr. Hornickel of Dommerich & Company in the fall of 1966 that Dommerich was canceling Textura's contract because there was a lull in the construction industry and Dommerich was getting rid of all accounts connected with the construction industry.

MR. TOPKIS: What has that to do with this case?

MR. BREINDEL: Dommerich has said that they canceled Mr. Powrie because he was a bad risk. They are

named as a co-conspirator.

MR. TOPKIS: There is not one scintilla of proof as to this.

THE COURT: You will have to build it up more.

(In open court.)

BY MR. BREINDEL:

Q Miss Sharpe, other than your salary did you ever receive anything of value from the plaintiffs?

A No.

Q Did Mr. Powrie while you were employed as a bookkeeper for plaintiffs ask you to do anything that was illegal or improper or unethical?

A No.

Q Do you know Harold Friedman?

A Yes.

Q When did You first meet him?

A The day I gave a deposition.

Q Do you know what position he holds, if any?

A He is with an accounting firm in Beverly Hills and he was representing the defendants, as I recall.

Q Did Mr. Harold Friedman ever recommend you for a position as an accountant?

A Yes, he did.

MR. TOPKIS: I'm delighted to hear it. But

at a recess.

MR. McGANNEY: The record speaks for itself.

Q Miss Sharpe, I would like to show you some Xerox copies of the books and records of Textura that you kept.

First, I show you the 1966 sales journals of Textura and I ask you if you can give us the date of the last entry, 1966, June 1966 sales journal?

A Is that what you're referring to (pointing)?

Q Yes, these dates here.

A What is you want?

Q Can you just tell us what the last date of entry is?

A July 7.

Q July 7? And just going back one year, let's go back now to 1965, and look at the same journal. Can you tell me what the last date in 1965 was?

A April 30.

Q So in April, 1965, you closed the books at the end of April?

A Yes.

Q In 1966 you continued to hold the sales book open until July 7? Is that correct?

A Right, 1966.

Q And that was done because Mr. Powrie told you

he wanted to make 1966 look as big as he could, didn't he, and he wanted to have $150,000 worth of sales in every month?

A No, he didn't tell me that.

Q Miss Sharpe, I would like to go back to your deposition, questions by Mr. Liggio:

"Q Miss Sharpe, do you recall Mr. Powrie every telling you that one of the reasons he wanted to have the invoices from the following month put in the prior month was because 1966 was a year that they were going to make it and they wanted to do $150,000 a month in sales and this was to get that $150,000 a month? Did you ever hear such a statement as that, Miss Sharpe?

"A Yes."

Do you recall being asked that question and giving that answer?

A I don't recall, but if it is in there I guess I did.

Q Just one more question on these books:

Can you find for me the cash disbursements for June, 1966? Here we are. I'm sorry.

Can you find for me the date of the last entry?

A 6/20.

Q June 20, 1966?

A Yes.

Q So the cash disbursements book was closed toward the end of June? Is that correct?

A Well, that would be, yes.

Q That is in accordance with proper accounting procedure?

A Yes.

Q Miss Sharpe, you testified that the Mo-Vac, the good will items were written off --

A Yes.

Q -- Textura's books?

A Yes.

Q Do you recall when that took place?

A I don't recall just when it was. In August or September, somewhere in there.

Q And Mr. Zimmerman had not been in to Textura since March? Isn't that correct?

A Right.

Q I believe you testified that the Mo-Vac and good will items were taken off the books at either the direction of Mr. Zimmerman or Mr. Powrie?

A Either Mr. Zimmerman's office or Mr. Powrie.

Q Mr. Zimmerman's office?

(In open court; jury present.)

MR. BREINDEL: Your Honor, we are now going to read from the deposition of Allan H. Friedman, taken by defendants on October 22, 1970.

Starting at page 3, line 22, examination Mr. Hardison:

"Q Mr. Friedman, what is your personal employment or business association at this time?

"A The name of the company is Magnet Wire Supply.

"Q Could you tell us --

"A I'm the president of the company, and the company is a distributor of copper wire.

"Q And how long have you been associated with this business?

"A Since its inception, about two years ago.

"Q Are you familiar with the plaintiffs in this lawsuit, Textura, Ltd., and Fenestra Fabrics?

"A Yes.

"Q And Malcolm Powrie?

"A Yes.

"Q Were you associated with Textura, Ltd. at one time?

"A Yes.

"Q And when was that?

"A Essentially 1965.

"Q And how long were you associated with Textura?

"A Approximately one year.

"Q What was your position?

"A I was the general manager of the company.

MR. BREINDEL: Page 5, line 6.

"Q What were the terms of your employment?

"A Relative to what?

"Q Salary, compensation, length of time involved?

"A I had originally come to work for Mr. Powrie on the assumption that I would remain approximately one year. I can't tell you the compensation at this time. I don't really recall the beginning compensation and the end. It has to be a matter of record. I don't really remember it right now.

"Q Why was it only for a period of one year?

"A Well, for two reasons.

"One reason is I was at that time bound by a restrictive covenant in an employment contract as a result of the sale of another company. And I had to remain out of that business for a period of one year.

"And secondly, Mr. Powrie had a plan which

required the services of someone like me, and that year was the year of implementing the plan."

Page 10, line 16:

"Q You stated a moment ago that during this initial phase of your association with Textura, you found that the finances were somewhat stretched.

"Is that a correct paraphrase of your statement?

"A Yes.

"Q In what respects were they stretched?

"A I am trying to answer that. I guess I must say that a business, any business consists of fixed overhead, the cost of operation relative to income. And our cost of operation had been built in anticipation of substantially increased sales.

"First we attempted to get ready to handle the kind of sales that we expected we would generate. And the money to do that was internally generated. And therefore, every dollar had to go a long way."

Line 23, page 11:

"Q During this period of time" --

MR. TOPKIS: Before you do that, can we have the intermediate line 7?

"Q How many salesmen were employed at this

time?

"A As salesmen?

"Q As salesmen.

"A Are you talking about in the very beginning of my employment?

"Q In the very beginning when you were analyzing the operations to see what could be done.

"A We had -- I'm thinking.

"Q Sure.

"A We had a New York office with one man. We had two here, and I believe we had -- and we had a sales operation in Atlanta.

"As far as I can tell, that is probably -- they were employed as salesmen, however, other people were concerned with sales in the company. But they weren't employed as salesmen."

Thank you.

MR. BREINDEL: "Q During this period of time did you review the books of Textura?

"A Yes.

"Q Did you draw any conclusions from what you saw in the books?

"A Only that we were in need of utilizing as much cash as we could generate because we were -- we had a

mda5 "Friedman

shortage of cash. It required -- well, certainly I noticed that cash that was not being used had to be removed from the stagnant state.

"If we had inventory that wasn't moving, we would have to try to move it.

"I certainly noticed costs, the entire cost of operation. I think that is primarily what I was concerned with.

"Q Did any items of cost stand out in your mind?

"A I think possibly not in the very beginning, but very shortly thereafter we certainly were generating a great deal of advertising expense, which I didn't -- certainly in the beginning didn't understand until I recognized that we were really investing in tomorrow, in the future.

"We spent a great deal more than our profits and our sales at that time would have warranged.

"Q What types of advertising were involved?

"A Well, essentially it was developing the publication. It was work to develop the publication that we anticipated we would put out. At that time the publication was certainly not a physical fact. We were putting it together.

"Q Which publication was that?

"A The Textura put out -- and Mr. Powrie will have to forgive me -- I can't give you the exact name."

Refreshed by Mr. Powrie.

"A It was the Engineer's Guide, where we developed the shade control theory, where we took many different fabrics and had those fabrics tested in a manner to develop information that would be hopefully received by an engineer, an air conditioning engineer and architect in proving that some window coverings would be more effective in controlling the sun and the hear than others.

"Q When was this book finally put out, if you remember?

"A Well, we had -- I would say after the middle of '65. I really don't remember that."

Page 15, line 3:

"Q Did you have a means for inspecting, a program for inspecting your fabrics?

"A Well, we continued to try to develop a good inspection program. I don't know that we really ever got to that point, but we certainly did inspect fabric and we had equipment for inspecting fabric.

"Q When would you make that inspection? Would you make it at the time you received the goods?

mda7 "Friedman

"A Generally no. I don't know whether -- simply my memory doesn't recall whether we ever developed a firm method of inspecting it prior to ever putting it on the shelf.

"However, we further processed the fabric. We may have had to send it for dyeing, the problem may have developed then. I think that because we were doing so many things we generally didn't take a close look at the fabric until a problem arose. And then, of course, we would take a much closer look."

Page 21, line 1:

"Q During the initial phase of your association with Textura, did you make any study of Textura's relationships with its suppliers?

"A I don't think I made a study of it. I was certainly aware of some of those relationships. I mean, we bought from a limited number of people and obviously they were important suppliers, and it was necessary that I become familiar with whom they were.

"Q Did you become familiar with the terms on which you purchased from these suppliers?

"A Yes. I was concerned with the amount of money we owed the suppliers on a monthly basis. The result of that being a major portion of our liabilities,

I was concerned with it.

"Q But you did become familiar with the terms on which you purchased from these suppliers?

"A Yes, I would say.

"Q Do you remember what the terms were?

"A No, I couldn't tell you what they were. I don't think there was anything unusual that would have pointed it out to me except that we ran consistently late in payment.

"I would assume the terms were something similar to a 30 day basis. At least that probably was what was printed on the invoice, because it's printed on most invoices.

"We had run consistently late prior to my coming there and during my tenure with the company.

"We made efforts to reduce that length of time and the amount of money that was owed, and that was a project that was constantly worked on."

Page 23, line 24:

"Q Was it your practice to report to Mr. Powrie frequently on your activities?

"A Mr. Powrie and I had an unusual relationship in that our offices were next to each other, but removed from the rest of the offices of the company.

mda9 "Friedman

There was an open door between our offices and we discussed many things every day.

"I wasn't required to discuss anything, and that was part of the condition of my original employment, that I would accept the challenge and the responsibility if I had the authority to go with it.

"I don't know of any occasion when that authority was curtailed."

"Prior to my coming in, I suppose that if there was a problem, they would discuss it with Mr. Powrie. Had they continued to do that, there would have been no point in my being there. And so they -- I had to insist that there was a line of contact and that line was to me. And that I was not concerned with the specifics of anypart of the business, the actual work, because I was no expert on anything except trying to run and organize that business so that it would become increasingly profitable.

"But I can't at this point tell you of the very specific things that I did.

"We had a sales meeting where we brought in all of the sales personnel from all over the country. It was a great deal of expense generated in doingthat, and it was something that Mr. Powrie

mdal0 "Friedman

and I had discussed at great length, the value of doing it. Rather than going to see them. We wanted them to come to the home office --

"Q Who were these people?

"A Specifically --

"Q No. Where did they come from?

"A New York; Chicago; I'm not sure about Detroit. At this point I just don't remember. San Francisco. The more I think about it, I must recall that I'm mentioning things how that I didn't count as sales people before, there certainly were. We had substantial sales in San Francisco and there were sales people there.

"At any rate, it was everybody concerned with the company. And we wanted them to see that we had made a lot of changes in the company in an effort to help them do their job, and to specifically control the business so that when they made a commitment, we could keep that commitment.

"We specifically installed, for instance, we purchased IBM recorders. I don't know if you're familiar with the little hand recorder that you hold in one hand. We had volumes of correspondence. And rather than have a secretary in New York type a memo

and send it here, we instituted a system where, I don't know how many we bought, we bought four or five or something of the IBM recorders, and gave them to each of the people out in the field and instructed them to simply send the tapes to us; we would type them; we would return a copy of the typed memo or whatever was on the tape to them, and we would keep a copy. And that was the result of my trying to get information, and I would be told, well, we don't have time to type it and I can't tell you and I don't remember.

"I wanted central control of what they were doing and I wanted them to spend their time doing what they were being paid to do, which was to sell. And I wanted a record in our office of everything that was done concerning a job especially where we weren't there to personally supervise it.

"If we talk long enough, I probably could, you know, in the next few months, I probably could think of many specifics, but I can't come up with them --"

Page 36, line 12:

"Q Do you remember any changes being made with respect to paying the suppliers?

"A I don't remember any specific changes.

It was certainly a problem that we dealt with constantly, was to pay suppliers.

"But I can't recall at thi moment of any changes, even though there may well have been some. I don't remember them at this moment. I was concerned with what we owed every supplier. I looked at that regularly."

Page 37, line 8:

"Q Mr. Friedman, you testified earlier this morning with respect to Textura's lateness in paying its suppliers during 1965.

"Why was Textura late?

"A I can -- I must answer first of all that the lateness was not a typically 1965 problem. It was a problem that was there when I came into the company. The nature of our work required that there was a substantial time lag from the time a fabric would be ordered, received by us, fabricated in entirety, installed and where we would finally get paid for it.

"That time lag made it a very difficult cash flow problem, and one that we could not -- where we couldn't honor an invoice on its terms.

"However, although we had the problem as a monetary problem it wasn't one that I had to do a

mdal3 "Friedman

lot with, because the situation had existed before and there wasn't any pressure of any kind that I had -- or threats of -- from the suppliers. I didn't have a close relationship with the suppliers. They would speak to me, but most of them knew the company and knew Mr. Powrie well long before I got there, and the problem -- they seemed to continue along the same vein as long as I was with the company.

"Q While you were with the company did any supplier hold up shipments of goods to Textura because of the payment situation?

"A No, I don't recall of any incident when that happened."

Page 50, line 6:

"Q Is the name L. F. Dommerich familiar to you?

"A Yes.

"Q Who is or what is L. F. Dommerich?

"A L. F. Dommerich was the factoring company with whom we dealt during my employment at Textura.

"Q With whom did you deal? Did you deal personally with Dommerich?

"A I got to know some of the people. Primarily Mr. Hornickel. As Mr. Hornickel knew Textura and the

mdal4 "Friedman

people involved well before my time there, when I came in, he made it his business to get to know me and I made it my business to get to know him, because that was in the realm of continuing in financing of the company. He was the factor.

"I didn't deal with him on a daily basis.

"Q Were you familiar with the procedures for submitting invoices to Dommerich?

"A Yes.

"Q What types of invoices would be submitted to Dommerich?

"A All.

"Q All invoices?

"A As far as I know.

"Q When the work was completed or uncompleted?

"A No. If we billed it, there may have been a stipulation in some of our contracts for partial billing, and we would then bill when that portion of the work was completed. Otherwise, we would bill when -- it was just like billing a customer. We would send the invoice to Dommerich at the same time as the work was completed.

"Q Do you remember any complaint being made to you personally by anyone at Dommerich concerning the

mdal5 "Friedman

placement of uncompleted jobs?

"A No.

"Q In 1965 at any time did you acquire any knowledge about Mr. Powrie's arrangement with respect to compensation with Textura?"

MR. BURGESS: Excuse me. I think you missed line 17.

MR. BREINDEL: I'm sorry.

"Q The placement of invoices covering uncompleted jobs?

"A No.

"Q In 1965 at any time did you acquire any knowledge about Mr. Powrie's arrangement with respect to compensation with Textura?

"A I generally knew Mr. Powrie's arrangement of compensation with Textura from the time I began working for the company.

"Q What was that arrangement in 1965?

"A Again, I can't give you specific numbers. If I can't remember my own compensation, I might find it difficult to remember his. But it was primarily a compensation based on the sales of the company, I believe, a percentage of the sales in which he took a draw against that compensation agreement.

"Friedman-

"Q Did he have a separate salary as an officer of the company, to your knowledge?

"A Separate in what sense? You mean did he get two checks a month?

"Q No. Separate from the percentage of sales.

"A No. He drew the compensation check -- I don't want to refer to it as a salary check -- the draw check, and I don't believe he ever drew any of the overage that might have been due him. Although we probably would have reflected that on our statements.

"Q What do you mean overage?

"A Well, if you draw a percentage of the sales, and that per cent equals a number of dollars in excess of what you have drawn, you are entitled to the balance of the figure. That would be the overage I refer to.

"Q You say to your knowledge he did not take the overage?

"A I don't recall him taking the overage."

Page 54, line 8:

"Q You spoke earlier about the cash flow situation in Textura. What sort of a flow picture was it in 1965?

mdal7 "Friedman-

"A Well, we were spending cash in order to build the organization and to develop the various sun control, shade control factors. And the results of those expenses were being borne on a current basis. And the fruits of those labors were not going to be appreciated until possibly a year later. And therefore our cash position was a very tight position.

"Q But you were anticipating an increase in sales?

"A Yes.

"Q And what did you base that prediction on?

"A Well, first of all, having the organization to sell the products, and the ability internally to handle those sales, and all of that was basically, or basically revolved around the publication of the literature. And having well-manned offices in those areas where we thought it was necessary."

Page 58, line 8:

"Q There is a reference in 259, the letter to Hornickel, to the amount of work which went into these statements, referring to cash flow and projection statements.

"Will you tell me what went into those statements?

mdal8 "Friedman

"A Generally it was a statement of ensuing months. It was a statement of the months following the date of the statement, and I can't tell you the date right now. It was an attempt to project our sales, our cost of operation, and the projected profits on a monthly basis for the following 12 months, I believe.

"O And how did you go about preparing those, what types of sources did you turn to?

"A To project the sales I had essentially two sources. One, I had the contracts on hand, which were not complete at the time, but which were in the house and could serve as a predicatable meas-ure of sales volume.

"Two, I had those jobs which we were in the process of bidding, where we had a dollar volume figure and where our chance of getting that contract was something I would have discussed with Mr. Powrie or Mr. Alonzo, of whoever else might have been involved in the particular contract.

"That, of course, is prognostication because they weren't in hand. But historically we had gotten a very large percentage of those contracts that we bid on.

"And with those, of course, we had the an-

mdal9 "Friedman

ticipated cost of fabric, we knew the cost of operating, and from that we had come up with an end result."

Page 66, line 11:

"Q Are you aware that Textura made an assignment in 1966 for the benefit of creditors, and subsequently was declared bankrupt?

"A Yes.

"Q Based on your knowledge" --

MR. TOPKIS: I object to the next question, your Honor.

MR. BREINDEL: It is the question posed by Mr. Hardison at line 15, page 66.

THE COURT: I will overrule it. I will let him read it.

MR. BREINDEL: "Q Based on your knowledge of Textura, do you have an opinion as to why the company failed?

"A I don't have an opinion at this time. When I left the company there certainly was no indication that the company was going to fail."

Page 77, line 3:

"Q Do you recall discussing with Mr. Powrie whether he'd be willing to give a personal guarantee to Hilton Stern?

"A I'm sure that I mentioned to him that they referenced that and certainly that literature was available to any and everyone. But Mr. Powrie had a relationship with most of our suppliers that existed before my time and which I had to assume permitted us to continue to do business with most of these people on a not normal basis.

"It was normal for us that if we didn't pay somebody in 30 days, that iddn't mean I was threatened with anything, because that existed for a long time. And normally he had that --

"Q What is the basis for this statement that you're making now?

"A What is the basis of it?

"Q Yes.

"A The fact that it existed.

"Q Did Mr. Powrie tell you it existed?

"A It existed because I was there and saw it exist.

"Q Did Mr. Powrie ever tell you that this was the way he --

"A Mr. Powrie told me that he had been doing business with these people for a long time -- by 'these people,' I'm talking about the major suppliers.

mda21 "Friedman

"Q Did you ever have complaints from the major suppliers requesting more prompt payment?

"A Yes, I think there were probably more than one occasion when a credit man from one of the principal suppliers might contact either our bookkeeper or me and want payment. And I would -- I think, as indicated -- correspond with him or talk to him or call him and if it reached a point where I thought it was a problem that Mr. Powrie could help with, I would mention it to him. He might talk to him.

"Q Do you ever recall any of these companies requesting personal guarantees from Mr. Powrie?

"A No, I really don't. I don't recall an incident when it happened particularly.

"Q Do you ever recall these companies refusing to ship goods to you because you weren't paying your bills on time?

"A Well, I recall it now because during my first session I was shown some literature --

"Q I was referring to the major suppliers.

"A No

"Q Do you ever recall major suppliers holding up goods pending payment?

"A They may have indicated that they weren't

mda22 "Friedman

going to ship and then that I would certainly have mentioned to Mr. Powrie. And normally he could satisfy that problem.

"Q By doing what?

"A Contacting the mill in question.

"Q And getting his bills in line?

"A No. I can't formalize it that way. He was on a first name basis with most of the people that we did business with when we were buying very large quantities. That permitted him to do things that I had to do on an objective hands off basis. I was not on a first name basis with any of these people.

"Q When you say that these were your major suppliers, do you recall what percentage of the goods they were selling you in 1965?

"A I couldn't tell you the percentages. I would say because we did a large job in Chicago during 1965, Clark-Schwebel certainly would have realized a great deal of that business. And I guess if I have to -- I couldn't list them in order, except I would say that probably Clark-Schwebel and Hess-Goldsmith were the larger two of the three.

"Q Do you have any idea what sort of a percentage of fabrics and inventory that you bought was repre-

mda23 "Friedman

sented by sales from these companies?

"A No, I couldn't give you that figure.

"Q Do you know whether it was over 50 per cent or under?

"A The three of them combined?

"A Yes.

"A I would say over 50 per cent."

Page 85, line 5 --

MR. TOPKIS: Before you go there, can I start on page 84?

MR. BURGESS: May I make a remark? I think we should establish Mr. Corbett interjected:

"When you say 'these companies,' you mean the three defendants?

"Mr. Liggio: Yes."

MR. TOPKIS: Page 84, line 9, please:

"Q I show you Deposition Exhibit 245, and you can ignore the first page of it which is just something that was stapled on there. And would you then identify the last five pages of the exhibit?

"A They are in my handwriting. They are handwritten notes dated 7-6-65. They reference a telephone conversation with Ray Nordheim of Clark-Schwebel at 9:25 a.m.

mda24 "Friedman

"Q Would you just read through that to yourself?

"A You want me to identify the rest first?

"Q Well, if it's all the same document in your handwriting.

"A It looks like it's all the same.

"Q Would you read through that to yourself?

"A Okay. I could not read this now -- I'm going to have to go back and read it again anyway. If you're going to ask me questions about specific subjects, it would be easier for me to reference it then. My analytical mind won't photograph that as I read it.

"Q First, what was --

"A I mean, I know the gist of the document?

"A It was a memo to myself as the result of a telephone conversation with Ray Nordheim, and it referenced the various subjects that we discussed during that conversation and subsequently references what action, if any, I thought we should take.

"Q Who initiated this phone conversation?

"A I can't tell you. I don't know at this moment. I did not normally talk to Ray Nordheim. That wasn't a daily project with me.

"Q Would you describe the gist of this memo

mda25 "Friedman

as being suggestions for improving the Textura operation?

"How would you describe the gist of this memo?

"A I would describe it as a series of items which Ray Nordheim brought up to me. I don't think he was in a position to suggest the inference that he was going to determine how we ran the business.

"On the other hand, some of his comments had some substance and I decided we would do something about them. Part of it was an attempt of him to solve some of his problems, which, in his mind, we were contributing to.

"Q Was one of the problems the payment of your bills? Item 4.

"A It was because, it says, payment of bills.

"Q Does this refresh your recollection as to your conversation with Mr. Nordheim concerning your bill paying problem?

"A Yes.

"Q And what was the substance of that conversation?

"A Well, referencing what it says here, or paraphrasing it, that he would like our bills brought

up to within a 60-day period, which I suppose was generous, that not being their normal terms. And inferring to me that if they have to tie their money up, the cost of money an incident in pricing the product to us. And like anyone else, we wanted to buy our product at the lowest possible price. He was pointing out to me that if they didn't have the expense of carrying the account, they would -- they could quote us at a lower price or conversely, that if they had to carry the account, they would have to quote us a higher price.

"And let's see what I said.

"Just that we should take a look at those payables and be certain they are not -- I use the word 'slipping.' That means going further behind.

"I think this comment obviously -- at least I thought at that time that it warranted some look on my part.

"Q Do you recall whether an effort was made to get the bills paid within 60 days?

"A I'm sure an effort was made to do that.

"Q Were you successful?

"A I don't think we ever brought the account to 60 days because we had a problem on one fabric which

was a continuing argument about a credit that was an issue there. I don't know that we ever would have -- that was a wedge that we had to use to bring h im to a decision that had been, frankly, fooled around with for many, many, many months.

"Q Did Textura have the cash to get its bills paid within a 60 day period?

"A No."

I have nothing further at this point.

MR. BRINDEL: I might point out I have no objection to Mr. Topkis asking the questions on the next two pages that were designaged by plaintiffs.

MR. TOPKIS: If you wanted it, I want it.

THE COURT: It's nice we are all in agreement, so you can go ahead.

MR. BREINDEL: For a c ange.

THE COURT: Hope springs eternal.

MR. BREINDEL: "Q Do you know why Textura didn't have the cash?

"A Because of our cash flow position, and we were generating cash expenditures of an immediate nature that would not bring results until some future time.

"Q And those were, again?

"A The Engineering Guide, the sales meeting, the opening of an office in Chicago, the moving an office in New York, a list of the changes and things that had taken place.

"Q Are those the unusual expenses referred to, the fact of Exhibit 244?

"A They certainly are some of them."

MR. BREINDEL: Your Honor, at this time I would like to put in evidence what was referred to as Exhibit 244, and has been premarked, I believe, as Plaintiffs' Exhibit 48.

MR.TOPKIS: In understanding what this is, it is a projection for hoped-for operating results prepared by Mr. Friedman in 1965 at some time.

Do we have the exact date of it, counsel?

MR. BREINDEL: The exact date of this?

MR. TOPKIS: Yes. When it was prepared.

MR. BREINDEL: All it says is "Notes for 1966, Projection," but it is covered in part by Mr. Friedman's testimony.

THE COURT: Does he give any date for it in his testimony?

mda29 "Friedman-

MR. TOPKIS: I don't think so.

MR. BURGESS: He left the company at the end of 1965, your Honor.

THE COURT: Then it would have to be some time in 1965.

MR. TOPKIS: Yes, some time in 1965.

MR. BREINDEL: Yes, it was prepared some time in 1965.

MR. TOPKIS: All right.

MR. BREINDEL: This would be Plaintiffs' Exhibit 48 in evidence.

(Plaintiffs' Exhibit 48 was received in evidence.)

MR. BREINDEL: Page 90, line 11:

"Q Was Textura a jobber or a converter?

"A A converter. We converted fabrics. I'm not expert enough in the fabric business to make that definition.

"Q Was Fenestra a jobber or a converter?

"A Fenestra sold fabrics. Or installed fabrics. At this point I can't tell you the difference between -- one handled contract jobs. Which one I can't tell you at this moment. I'm sorry, I can't define that either.

mda30 "Friedman

"Q Was there any problem having Textura and Fenextra operate as both a converter and a jobber?

"A No.

"Q Did you hear any complaints about this?

"A No.

"Q Did Mr. Powrie ever say that people were complaining about his being both a converter and a jobber?

"A I think he -- one time when I first asked him about the two companies he may have mentioned to me that it was easier for us to handle one kind of sale through one company and another kind through another.

"Q You don't recall any --

"A It wasn't a detailed discussion. I was satisfied with the answer.

"Q Did Alonzo ever tell you that?

"A No.

"Q Mr. Friedman, do you know what sort of a year 1965 was going to be?"

MR. TOPKIS: Objection, your Honor. Asking the witness to be a mindreader or prognosticator doesn't seem to me to be a proper question.

MR. BREINDEL: It is Mr. Hardison's question.

mda31 "Friedman

MR. TOPKIS: I don't care. I am not Mr. Hardison. I am counsel for Stevens.

"MR. BREINDEL: Counsel for Stevens was present at the deposition and I don't think they objected to the question.

THE COURT: I will sustain the objection.

MR. BREINDEL: Page 96, line 21:

"Q Do you recall any discussions with any of your three big mills, suppoiers, and Dommerich, in the latter part of 1965, in which you participated and which the mills were told, and Dommerich, that 1966 was going to be a very profitable year?"

MR. TOPKIS: Objection, your Honor. This appears to have been a meeting with Dommerich, and of consequence anything that took place can't have anything to do with the defendants. They weren't there.

What was the question?

MR. BREINDEL: Do you recall any discussions with any of your three big mills, suppliers, and Dommerich, in the latter part of 1965, in which you participated and which the mills were told, and Dommerich, that 1966 was going to be a very probable year?"

MR. TOPKIS: How about 1965?

THE COURT: Yes, it should be 1965.

MR. TOPKIS: The answer and the subsequent questions make it clear this was a meeting at which only Dommerich was present and not any of the defendants.

THE COURT: Is that correct?

MR. BREINDEL: That's correct.

THE COURT: I will sustain the objection then.

MR. BREINDEL: Going on to page 98, line 11:

"Q Was it a practice to prepare internal statements such as the Exhibit 243 when the auditors were preparing a quarterly statement?

"A Yes. We did this for our own information. Generally we would want to prepare that monthly. I would assume we did it monthly.

"Q Do you know whether you're internal December statement showed a profit?

"A I can't answer that now.

"Q Going back a little bit, you saidthat Mr. Nordheim indicated to you that by their carrying you you would have to pay a higher price for your goods from Clark-Schwebel.

"Did any other mill or persons tell you the same thing, that they were charging a higher price for goods?

"A No other mill --

"He didn't tell me that either. He inferred that if they had to do that, their costs would be higher and they would have to charge a higher price.

"Q Is this a normal business practice from your experience?

"A I don't know whether it's normal. I think it depends on the nature of the business. I don't know if it would be considered normal."

Page 99, line 24 --

MR. TOPKIS: Let's go on just a little big."

"Q Did you ever hear anyone tell you or participate in any discussions where it was said that Clark-Schwebel, J. P. Stevens, and Burlington wanted to drive Textura, Fenestra and Mr. Powrie out of business?

"A No.

"Q Di you ever hear that?

"A No.

"Q Do you know of any facts which would support

that contention?

"A No."

Thank you.

MR. BREINDEL: "Q Were you having a quality problem with goods sold to you, fabrics sold to you in 1965?

"A Yes.

"Q Was this a quality problem limited to any particular supplier?

"A It was a major problem with the several Clark-Schwebel weaves that I can remember, because of the amount of time I spent trying to solve some of the problems.

"Q Did you have this problem with anybody else?

"A We had problems with other fabrics. Who would have those fabrics and the names of them now I can't recall, because I can't relate it to a specific incident. There was one particular fabric that was woven which we called Spartan, as a name, and that fabric caused a great deal of trouble and was one which I was involved in, trying to solve the problem of do we stop the trouble that the fabric causes and whose fault is it.

"And then it got involved in a credit that we were seeking and discussing a great deal. And we finally reached the point where we decided we would simply not sell the fabric under any conditions; that it was worthless to sell and causing a great deal of problems. And it was over that discussion that I met Mr. Gumbiner because I went down to ask his opinion about the fabric and what might have caused the problems."

Page 126, line 17:

"Q Mr. Friedman, you testified that when you joined Textura you noticed certain problems with the company and worked to correct those problems?

"A Yes.

"Q Were those difficulties of such a nature as to cause the company serious financial trouble?

"A No.

"Let me -- you help me clarify it.

"I don't know what the term serious means. They in the sense that if we corrected them, we make more money.

"Q Were they of such a nature that they might cause Textura to become insolvent or fail?

"A I never expected Textura to fail when I

left the company. As a matter of fact, if I could have owned half of the company, I would have stayed.

"Q In your judgment, was Textura a reasonably well-run corporation when you joined it?

"A It had grown substantially from its inception. And that indicated to me that it had some substance.

"Q To overcome Mr. Liggio's objection, how would you describe the nature of Textura's operation when you joined the company?

"A I think it was typical of most companies that grow from small beginnings rapidly, short of cash, not enough management in the company to do all the things that had to be done. It had grown to the proportions where it needed more management and someone looking overit.

"I think it had acquired the other -- another problem that happens to most small companies, where the employees stay, a lot of personal relationships do grow up in the company. And I was an injected ingredient that had none of those personal relationships that could take probably a more objective look at it.

"Q How would you describe Textura's operations when you left in 1966?

"A I sincerely felt that everything was under control and that as long as the pattern that we had established would continue, that -- and if the sales came up to the expectations, that we had anticipated, the company would make a great deal of money, and by the end of 1966 would no longer have the cash problem they had lived with.

"Q Was your work at Textura directed primarily at its expansion program that you described?

"A Yes.

"Q You've testified at some length about the changes that you initiated and tried to put through, and apparently did put through.

"Did you have any difficulty with Mr. Powrie in accepting any of your recommendations?

"A Never.

"Q Do you recall having any difficulty with anybody else at Textura concerning your recommendations?

"A When I first started there was a reluctance to discuss anything with me on the part of any of the employees. I was a complete stranger, and, I think, if I recall correctly, I went to Mr. Powrie and said, 'I think we have to make it clear as to why I'm here and that I do have the authority we agreed I

had.'

"And I think we called everybody together, maybe the third day or the first week, or something, and made a speech of sorts to them indicating that what we were doing was -- would eventually be for the good of everybody.

"That I was there with the authority to pretty well do what I wanted to, and that I didn't know one thing about the fabric business."

Page 133, line 8:

"Q You were asked in your direct examination about fabric quality problems.

"Did any problems you encountered in that regard, in your judgment, contribute to Textura's restricted cash flow?

"A Yes. It generated expenses for the company to rectify or try to rectify with customers or with our own -- sometimes we'd get a fabric and not even be able to use it after it was dyed. And, of course, the handling of it, the time involved, the money involved, that certainly -- it would contribute to it.

"Q While you were associated with Textura in 1965 through early 1966 did you have any knowledge of Textura, its management or Mr. Powrie engaging in any

dishonest or dubious practices?

"A No. I would have left the company had I known that."

Page 134, line 20:

"Q Did anybody ever tell you that Mr. Schutz agreed that Textura's terms would be 120 days?

"A No one told me that specifically.

"Q What do you mean' specifically'?

"Did you have knowledge of it?

"A We took 120 days in many casea and consistently done that, and it hadn't caused a particular problem. It was sort of an unwritten accepted fact that that is -- that we paid our bills slowly."

Page 141, line 16 --

MR. TOPKIS: Before you go to that, I would like to read from page 140, line 16, please, Mr. Burgess, if you would help me out:

"Q How would you characterize how you were treated by the mills in 1965?

"A Generally I would characterize that their treatment of us was fine. They fought for their normal rights, I think, and went along with us when we couldn't do it."

Thank you.

MR. BREINDEL: Page 141, line 16:

"Q Referring to Deposition Exhibit 244" -- which I believe has been received in evidence as Plaintiffs' Exhibit 48 -- "which is your projection for 1966, under the $150,000 sales column, what is the last line figure?"

MR. BURGESS: Has that been received in evidence?

MR. BREINDEL: Yes.

"A That is the profit column.

"Q Does that mean that --

"A Operating profit.

"Q Then did you need $150,000 to break even?

"A When we made the original estimates, we did. When we -- while those original estimates were made -- I can't -- don't know the piece of paper, but there is a set of notes that goes with this, a large, thick set of notes.

"Mr. Liggio: Was that the exhibit you looked at gefore?

"The Witness: I have seen that exhibit.

"A While all this was being prepared, when this was done it was long before this was done. At the same time that we were doing this, we were continually

changing the operation, finding more information, changing overhead. This was not done in one day. This was literally months of work. And so when we started here with $150,000 estimate, by the time we put this together" -- referring to Plaintiffs' Exhibit 48 -- "we had more factual information, more time had gone by. Some of the expenses that we had previously we didn't have any longer. We let a lot of people go in December and so forth.

"At any rate, these were more factual than these estimates. And I don't know how to justify that they didn't match. The idea was trying to find out what were we and where were we going, but it was constant state of change.

"So that it is entirely possible that we estimated $150,000 here based on these things. And the only way you'd ever know would be to take what was used as the estimate and then compare it with what actually existed when this was put together. Because we may have changed some of these things.

"Q Is it your testimony, then, that Deposition Exhibig 244 is more accurate than Deposition Exhibit 241?

"A Yes. It's a later figure. It's the

result all the rest."

I have nothing further from the deposition.

MR. TOPKIS: Let's go on just a little bit:

"Q On Exhibit 244, Mr. Friedman, this was based upon your last estimates of cutting costs and things?

"A Yes.

"Q And again, it was just an estimate based upon what you hoped to do in the future?

"A Yes. Well, some of this was known. Some of items, if you'll look, some of these items were known items. Some of these are variables. The known items of course we could pick off very currently.

"Q I take it, then, that if the cost cuttings are not successful and the costs turned out to be as they are in Exhibit 241, then the $150,000 figure was the break even point?

A It would depend -- it may not even resemble that depending on what happened to the costs."

Thank you.

MR. HARDISON: Mr. Breindel, I would like to offer in evidence at this time Defendants' Exhibit 628, which was identified by Mr. Friedman on his deposition at pages 22 and 23 as having been prepared by

Mr. Friedman on his deposition at pages 22 and 23 as having been prepared by him. Do you have any objection to that?

MR. BREINDEL: No objection.

(Defendants' Exhibit AV was received in evidence.)

THE COURT: If anybody can read it.

MR. HARDISON: I will supply a better copy.

MR. TOPKIS: Perhaps we can type up a clear copy with the agreement of counsel.

THE COURT: If it is of any consequence. It is just a blur to me.

MR. BREINDEL: At this point we could start with another deposition.

THE COURT: How long a deposition?

MR. BURGESS: It's fairly long, and there are a number of documents to be introduced in connection with it. We would rather not interrupt it.

THE COURT: We will adjourn until Monday at 10:00 a.m.

(Adjourned to November 4, 1974, at 10:00 a.m.)

"A Well, in that period we'd have to consider Glass Fabrics on the Coast, and/or Textura, as being a converter, although we technically classified them in our own minds as in one sense a converter, but in the other sense a jobber, because of their type of distribution."

MR. HARDISON: May I have a counter-designation, same page, line 20:

"Q Were these last companies that you identified, starting with Seneca, were those considered jobbers, in your opinion, rather than converters?

"A We considered those -- they called themselves, and it was the term used, Fifth Avenue Converters. However, in the distribution of the fabrics we sold them, they did some converting. They sold some jobbers, but they also did some direct selling."

MR. BURGESS: Page 21, line 16:

"Q You mentioned that Glass Fabrics-Textura was sort of anonymous, somewhat like a jobber in some respects?

"A Yes, in our mind.

"Q Could you elaborate on that?

"A Well, to us" -- referring to Burlington -- "a jobber is a firm who distributes its fabric directly to retail stores in cut order forms or piece goods sales at

retail; directly to decorators for individual jobs, so to speak. That is our technology. And others might have different technologies, or different ways of describing it.

"Q That is your notion or Burlington's notion of a converter?

"A That's Hess, Goldsmith's notion, yes.

"Q How did Textura or Glass Fabrics differ from that notion?

"A Well, in this sense, that jobbers do not buy greige goods and finished goods and then distribute goods. Jobbers by finished goods in relatively small quantities and distribute them. Textura and subsequently Glass Fabrics, bought the greige goods, finished the goods and distributed them. Normally a converter is a person who takes the greige goods and finishes them. So they had both those functions.

"Q In other words, they both converted and sold directly to the contractor?

"A That's right.

"Q Did you have any objection to that practice?

"A Did I have any objection? No.

"Q Or Burlington.

"A At times it was somewhat ticklish with some of our other customers, but we had no objection to it.

"Q How was it ticklish?

"A Where we had pure converters who were distributing through jobbers, because we were selling goods at approximately the same prices, style for style, to Glass Fabrics-Textura, and they were going directly to jobs, it might be somewhat difficult for our regular converters to sell to a jobber who, in turn, was going after that business, for everybody to make a profit.

"Q In other words, Textura could undercut another converter?

"A They could. I didn't say they did, but they could.

"Q Did you receive any complaints about this?

"A Yes.

"Q From whom?

"A Qual-Fab.

"Q Anybody else?

"A Yes, but the other people we received them from were doing the same thing, people such as Thortel or Ben Rose. I really can't call that a valid complaint. That's a bitch, not a complaint.

"Q Did you personally receive the complaints from Thortel?

"A Yes, I personally received all the complaints.

"Q From anybody who complained?

"A Yes. We are a small company.

"Q Were any complaints in written form?

"A No.

"Q Do you have any approximation of the period of time over which these complaints were received?

"A Well, just by the chronology of the whole thing, it would have to be when I was in a responsible position to act on the complaint, and it would probably have to be in the chronology of this period '62 to '66, in that four-year span. It would have to be in there. It certainly wouldn't be before, because I had no reason to receive them before, and I wouldn't have received them afterwards."

MR. HARDISON: Line 22, same page:

"Q Did you have occasion to discuss these complaints with anybody in Burlington?

"A I certainly discussed them wth Mr. Colton when I was reporting to him.

"Q What, id anything, did he have to say about them?

"A 'Do something about them.'

"Q Did you?

"A No.

"Q Did he tell you what he had in mind for you to do?

"A No.

"Q Did you ever discuss any of these complaints with anybody at Clark-Schwebel or Stevens?

"A No."

MR. BURGESS: Page 67, line 20:

"Q Mr. Vollers, what volume of business did you do with Qual-Fab over the years, can you recall?

"A Qual-Fab has been consistently an account doing anywhere from -- well, let's start from zero in 1956, so that by 1960 we were probably doing over a million dollars, reaching a peak probably in '64, '65 of close to $3 milion, and at the present time" --

And that is some time in 1970.

" -- and at the present time approximately a million and a half to a million and three-quarters a year. These are all annual figures.

"Q Do you recall what the volume was was in 1966?

"A 1966, I expect two and a half, two and three-quarters million.

"Q Were you still receiving complaints from Qual-Fab about Textura's distribution methods in 1966?

"A I never had a series or a term of complaints.

I occasionally received a gripe from these people, or a complaint from these people, regarding they had gone to the West Coast to attempt to sell a jobber some goods or what have you, and found that they were being -- that they found it very difficult to merchandise the fabrics they bought from me, the high style fabrics, in competition with Textura.

"At no time did I ever consider this one of the more serious problems in my business career. I found it to be one of these -- you asked the question and I have to tell you what did happen, and I still do not feel it was a serious problem.

"Q Regardless of the way you characterize it, did you continue to receive any gripes or complaints from Qual-Fab in 1966?

"A I would have to answer the question yes. Yes."

MR. HARDISON: Counter-designation, page 65:

"Q All right, the record is clear.

"With respect to complaints that you received from Qual-Fab, and perhaps some others, concerning Textura's place in the distribution system in the industry, I believe you testified that Mr. Colton told you to do something; I believe 'Do something' was your quote.

"What did you take that to mean: make the

problem go away somehow?

"A Pacification, calm down the troubled party, and in most cases this is all that it required.

"Q Did he suggest that you stop doing business with Textura?

"A Never."

MR. BURGESS: Page 61, line 23, and this has reference to the meeting on June 2 that Mr. Vollers testified he had with Mr. Powrie:

"Q Did the quality problem persist after this meeting of June 2nd?

"A The quality problem never was solved, per se. We felt we made some steps and progress in doing some of the things that had to be done. But I think that the climate and the environment of doing business from then on deteriorated so rapidly in many ways that whether or not we solved the problem is immaterial, in my mind."

That concludes the deposition.

MR. BREINDEL: At this time, your Honor, we would like to recall Professor Bruner.

THE COURT: You better reswear him.

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For 1963, we had a figure of 964,000, we now have a figure of 907,000.

For 1964, there is no difference.

For 1965, we had, and these figures are in thousands, 1104, we now have 1121.

For 1966, we had 1114, we now have 1150.

Q Do these differences significant effect your original projections?

A No, they do not.

Q What was the purpose of Table 1 of your report?

A The purpose of Table 1 in the report was to help us to determine the proportion of Textura's sales to our proxy for the industry, which was SIC Code 2591.

Q In connection with Table 1-A, how did you compute the in-California sales figures shown on Table 1-A?

A The data for California I computed from the spread sheets, which are in a series of plaintiffs' exhibits, which note the sales of Textura, Incorporated, within California, for Northern California and for Southern California, and the data I have in Table 1-A reflects the summation of those two schedules, Northern and Southern California sales.

Q All these sales data shown on 1-A you yourself computed from the spread sheets?

A Yes, I did.

Q Can you tell us what is the difference between Table 3-A and Table 3 as it appears in your original report?

A The difference is as to the percentage figures shown, which reflect the ratio of Textura sales to drapery, hardware, blinds and shades data.

For 1962 there is no change in the per cent given.

For 1963 we had 7.713 per cent; we now have 7.256 per cent.

For 1964 there is no change.

For 1965, we had 8.427; we now have 8.557.

For 1966 we had 8.252; we now have 8.525.

The average of those figures was 7.338 per cent; it now is 7.327 per cent.

Q What is the difference in the average percentage shown on the original Table 3 as opposed to Table 3-A?

A There is a difference of 14 one hundredths of 1 per cent.

Q In your opinion, is that 14 one hundredths of 1 per cent a significant -- does that significant effect your original projections?

A No, it does not.

"Q Did Mr. Erskine ever tell you that the higher price you paid reflected higher costs that they had in selling to Glass Fabrics?

"A No.

"Q Did anyone ever tell you that?

"A No.

"Q What were the credit extensions that you were referring to?

"A 120 days.

"Q And what do you mean exactly by that?

"A Well, they extended our credit, I think normal terms with mills are 60 days, and they extended them to 120 days."

Page 68, line 23:

"Q Do you know the dollar volume of the unfinished contracts of Fenestra Fabrics and Textura which you had initially obtained for them at the time Textura filed the assignment for the benefit of creditors?

"A Not off the top of my head. I believe it's in the letter I wrote.

"Q Is that the letter you are referring to Exhibit 211?

"A Yes.

"Q Looking at that letter, does it refresh your

recollection as to the dollar amount of unfinished contracts?

"A Yes. If you add them all up, it's there.

"Q Are there any other unfinished contracts other than those contained in this letter?

"A No. I don't think there is.

"Q Did you finish all of the contracts referred to in this letter, Exhibit 211?

"A Did the Golden Gateway, Item 1. First America Building, Item 2. Item 3 Item 4. Item 5. Item 6.

"Q You did all of them?

"A Yes.

"Q The items you were just referring to are all in Exhibit 211?

"A Yes.

"Q Mr. Johnstone, do you know whether Mr. Powrie had billed any of these jobs for the total dollar amount of the jobs at the point in time there was an assignment for the benefit of creditors?

"Had billed any of those jobs?

"Q Yes.

"A No.

"Q You don't know or he did not?

"Q He did not."

Page 71, line 9:

"Q Mr. Johnstone, I refer you to the top of page 3 of Exhibit 211, where you've written 'There were many jobs that were lost due to our inability to supply the specified fabric and, in fact, quotations made in behalf of Textura, Ltd.'

"I have a little trouble understanding the last part of that sentence, 'and, in fact, quotations made in behalf of Textura, Ltd.' I wonder if you could explain that?

"A Yes. We lost johs because we were not able to supply the merchandise which was specified and some cost analysis to architects were made and some quotations made out to clients through architects. And we were unable to fill them.

"Q Do you know what specific jobs you were unable to fill?

"A No, I do not.

"Q Do you have a list of any of those jobs any place?

"A No, I do not.

"Q Were these all for fiberglas fabrics?

"A Yes, they were.

"Q Were any of them Verels?

"A If they were, they were very little on Verels.

"Q Do you have any idea of what percentage of your business were Verels in 1966?

"A A very small portion of our sales were in Verels.

"Q Did many of your contracts for the sale of Fiberglas fabrics in 1966 specify heat shade coefficient factors?

"A Definitely.

"Q How about 1965?

"A Yes, in '65, yes.

"Q And I take it you used this as a selling technique?

"A Yes.

"Q In 1967, did any of your contracts specify heat shade coefficient factors?

"A Yes.

"Q Which contracts were those, sir?

"A That is my concept of the approach in the penetration business. Every specification I write has a shading coefficient.

"Q Is that true today?

"A Yes.

"Q Every contract you write today has a heat shade coefficient factor --

"A Every specification.

"Q What is the difference between a specification and a contract?

"A You're writing a specification for an architect, it is part of the specification, it goes out to bid.

"Q Where do you have your fabrics tested today for heat shade coefficient factors?

"A I do not have them tested.

"Q How do you know what are the heat shade coefficient factors of the fabrics you sell?

"A They are supplied to me by the firms that I represent.

"Q Who are those firms, sir?

"A Thortel Fireproof Fabrics.

"Q And they supply all the heat shade coefficient factors?

"A Yes.

"Q Have any of your customers required heat shade coefficient factors on the fabrics you sell?

"A Yes. They do. The architects.

"Q All of them?

"A Everyone I talked to. That is a very important part of any penetration fabrics, its application.

"Q Can you name me five of your customers who have required heat shade coefficient factors?"

MR. TOPKIS: Your Honor, these are questions put to a fellow named Johnstone in 1970. His customers required coefficient factors? I don't know whether they do or don't. What's it got to do with this lawsuit?

MR. BURGESS: I think it is relevant to the damage question. We introduced testimony of experts.

THE COURT: I will take it.

(Reading continued: "A

"A Wooster, Bernardi and Emmens; Skidmore, Owens & Merrill; Arthur Ginzler & Associates; Interplan Incorporated; Space Design Incorporated. And all the rest of the architects, this is part of their specifications and requirements."

MR. BREINDEL: Page 84, line 22 --

MR. TOPKIS: Excuse me. At that point we have some objections on the ground of hearsay, and

I would like your Honor to consider the transcript.

(At the side bar.)

THE COURT: This is Mr. Gumbiner again.

MR. TOPKIS: That's right.

MR. BREINDEL: He is named as a co-conspirator.

MR.TOPKIS: But there is not the faintest scintilla of proof as of this moment that he was a conspirator. That being so, this is hearsay.

THE COURT: Objection sustained.

MR. TOPKIS: That goes all the way over to --

MR. BREINDEL: Do you have objections to the questions and answers at page 91?

MR. TOPKIS: Yes, I do.

MR. BURGESS: Beginning with 14 it is not Gumbiner.

MR. TOPKIS: What page?

MR. BURGESS: Page 91, line 14, it is not Gumbiner.

MR. BREINDEL: That deals with Erskine.

MR. TOPKIS: And Mr. Erskine at the time was not employed by Burlington.

MR. BURGESS: Your Honor, there are further

"A I was talking to Paul regarding the various weave styles that we needed, such as Crown, for various jobs and the lack of shipments. He replied that they were having problems weaving it and they would work on it. And it was just simply follow-up calls on Crown and Vista and I believe Morrow.

"Q Just to pinpoint this conversation, did you tell Mr. Erskine that you needed, Crown, Morrow and Vista?

"A Yes.

"Q And did you tell him that there were lack of shipments on each of these fabrics?

"A Yes.

"Q And did you tell him anything else?

"A I believeI mentioned -- I recall mention some of the jobs where we needed the fabric, we were expecting it.

"Q Do you remember what jobs those were?

"A One in particular was the Crocker Citizens Plaza job.

"Q Yes.

"A I believe we had a hospital, the Harbor General Hospital.

"Q And you mentioned these jobs to Mr. Erskine?

"A I needed to know the availability of the fabric, what its flow rate was, so we could --

"Q Did you mention any other jobs?

"A No. I recall these two jobs were critical.

"Q I'm not sure that's responsive.

"A Excuse me.

"Q Did you mention these jobs to Mr. Erskine in this telephone conversation?

"A Yes, I did."

Page 205, line 21 --

MR. TOPKIS: Before we go on there, let's finish the business about the Crocker Citizens job:

"Q And what was the fabric to be used in the Crocker Citizens job?

"A Vista. New Vista

"Q And at the time of this telephone conversation, in July of 1966, had Textura ordered the Vista for this job?

"A No. I believe this was -- we were trying to modify the then existing Vista.

"Q I'm just trying to get what you told Mr. Erskine in this conversation.

"Did you ask him for a purchase order of New Vista in this telephone conversation in July?

"A Did I ask him for a purchase order?

"Q Yes. Did you tell him that you wanted to buy new Vista for this Job, or had you already purchased it?

"A No. This conversation with Paul on Vista revolved around the need for the then existing Vista fabric modified. We needed it -- we needed samples woven of it and information.

"Q So with respect to your conversation about Vista, you asked Mr. Erskine for samples to be woven of the new Vista, and for some information about it?

"A Yes.

"Q What was the information you were asking him about, to the best of your recollection?

"A Availability of the sample runs.

"Q Of the sample runs?

"A Yes."

MR. BURGESS: Your Honor, I object to this. Our designations related only to the fabric Crown --

MR. TOPKIS: Not so. The witness was asked about Vista.

MR. BURGESS: Withdrawn.

MR. TOPKIS: (Reading:)

"Q Had you ordered new Vista at this time?

"A No.

"Q So I take it your statement about your discussion of lack of shipments did not pertain to the new Vista fabric?

"A Correct."

MR. BREINDEL: (Reading.)

"Q What was the fabric to be used on the Habor General job?

"A It was a Crown.

"Q And had Textura ordered the Crown for the Harbor General job at the time of this conversation?

"A We had on-going contracts and needs for Crown.

"Q In other words, you had ordered Crown for this job at the time of the conversation?

"A Yes.

"Q And did you say anything to Mr. Erskine with respect to the Crown fabric in this conversation?

"A Yes. I ASKED HIM WHERE WAS IT, when were we getting more.

"Q Pursuant to a purchase order you had already --

"A I don't discuss the purchase orders with Paul. We had on-going contracts with him.

"Q But it was your understanding that at this time the Crown for this job had already been ordered?

"A Yes.

"Q And what did Mr. Erskine say to you with respect to the statement you made to him on the Crown fabrics?

"A He explained to me he was working with his principals and with Mal Powrie on the purchase of these goods and the delivery of these goods."

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Page 208, line 19:

"Q I'm asking you, did Mr. Erskine say anything to you or to Mr. Powrie with respect to the statements you have already testified as having made to him?

"A The statements, they were having -- he began to tell us they were having trouble weaving Crown, the seconds and the fall-out was great. And they were working on it more and he'd have further information."

MR. TOPKIS: "Q Did he say anything with respect to your statement on new Vista?

"A He said they would start weaving a large quantity of it for us. I felt sure that would be coming shortly."

MR. BREINDEL: Page 211, line 22:

"Q I'm asking you for the substance of what you said to Mr. Erskine and what Mr. Erskine said to you in a telephone conversation, the first telephone conversation you had with him during the period from September to the end of October in 1966.

"A The substance of it was that they could not --

"Q Before you continue --

"A All right.

"Q What you said and what he said is what I'm

looking for.

"A I told Paul that we were in desperate need for Crown and the fabrics that were on order. We were not getting them. The quality of the fabrics that we -- they had been shipping to us now was terrible, was as much as 50 per cent unusable.

"Q Did you tell him it was unusable?

"A Yes.

"Q Did you mention any other fabrics to him aside from Crown in which the quality was terrible?

"A There were other fabrics. I don't recall it now.

"Q I --

"A But on Crown specifically I remember that --

"Q You told him --

"A I told him.

"Q -- that the quality was terrible?

"A Yes.

"Q Do you remember telling him that the quality was terrible on any other fabric in that conversation?

"A Not right now. In that conversation, having to do with Crown and how disappointed I was that after all these many months of conversations and meetings where we expected the Crown, that not only was it coming

in slow in slow and in small quantities, but coming in in such terrible condition and an unusable condition.

"Q What did Mr. Erskine say to you in this telephone conversation that took place in this period of time, September through October 1966?

"A Saying they were having a lot of trouble weaving Crown and he couldn't understand why. He'd come up and take a look at it."

MR. TOPKIS: "Q He said he would --

"A He would come up to the office and take a look at the goods with Mr. Powrie. He was trying his very best to take care of us.

MR. BREINDEL: Page 216, line 12:

"Q Can you tell me what you said and what Mr. Erskine said and what Mr. Powrie said at this late November meeting?

"By the way, before that, where did the meeting take place?

"A It was in our office.

"Q Can you tell me the substance of what anybody said?

"A Well, Paul had come into the office to deal with Mr. Powrie, and it was on these same subjects of fabrics and availability and seconds and all."

(Pause.)

MR. BREINDEL: We have nothing further from this deposition.

MR. BURGESS: At this time plaintiff has concluded its case, your Honor, subject to the checking of some financial information, summaries, which have been provided defendants and we are going to work that out.

THE COURT: All right. I will excuse the jury for the day and we will start at 10 o'clock tomorrow morning -- 10:30?

Come up to the side bar?

(At the side bar.)

THE COURT: I can hear argument, I guess, this afternoon, for a while, on any motions.

How long do you estimate your case will be?

MR. TOPKIS: Our case will be quite brief, your Honor.

THE COURT: By "quite brief," what do you mean?

MR. TOPKIS: Depending on how you rule on the motion to dismiss, your Honor, but I would say at the outside two days, and we would hope to be

done before that.

THE COURT: Well, I have not heard arguments and I won't rule until after I have heard argument, but I will let them go until 10:30, because after hearing your argument I might want to think it over overnight.

Why don't I excuse them until 10:30 tomorrow.

(In open court.)

THE COURT: I will excuse you until 10:30 tomorrow. We should complete this within a few days.

We will take a brief recess.

(Recess.)

(In open court; jury not present.)

MR. TOPKIS: If your Honor please, at this time on behalf of all three defendants I would like respectfully to move for judgment of dismissal of the complaint on the traditional ground that there is insufficient evidence on which to send any part of this case to the jury.

I would be delighted to argue that proposition now, if your Honor wishes, or perhaps you would rather have plaintiffs attempt to suggest what they believe they have proven.

THE COURT: I will leave that up to you as to how you want to handle it. I think it is your motion. It would seem to me you are the one to proceed.

MR. TOPKIS: I'm going to totally ignore some allegations which there has been just no evidence of. For example, there are Robinson-Patman claims.

MR. BREINDEL: We will stipulate to dismiss those, your Honor.

MR. TOPKIS: Fine.

And there are claims based on Section 2 of the Sherman Act relating to attempt to monopolization, and I haven't heard anything about those either.

MR. BREINDEL: Likewise we will stipulate, your Honor.

MR. TOPKIS: Unless I am wrong, then, I think that what we are dealing with here essentially is two claims: First, that the defendants entered into a price-fixing conspiracy which affected the plaintiffs; and, second, that the defendants entered into a conspiracy to put Textura out of business.

Before I get to either of those two, I would like to say a word about the three plaintiffs with whom we are dealing here.

The evidence on Fenestra was that it is a, and I quote, shadow without economic significance, that it was a conduit and nothing more, that its transactions were washed into Textura.

I don't think I need say anything more about Fenestra.

So, too, with Malcolm Powrie. That Mr. Powrie was the target of anything that happened I don't think can fairly be concluded or rationally be concluded on this evidence.

Now, as to Textura, coming first to the price-fixing claim, as we said in our opening there was a price-fixing agreement to which these three defendants

was on Mercury; they knew each other, were familiar with each other.

Mr. Clark was involved in both ends, Mr. Schwebel was involved in both ends. These people had a history of cooperation and, as I say, they worked for the other companies prior to that time.

In light of this, I think that the jury could find -- in light of all this background -- that the so-called credit information exchange we heard about at length, the routine --

THE COURT: There is nothing illegal about credit exchange.

MR. BURGESS: I understand that, your Honor. I am suggesting it was not that, that it was something more than that, I am suggesting in the light of the matters I have suggested and the matters I will develop in argument that it was more than the routine exchange of credit information, that it involved in effect, suggestions to follow the lead of Clark-Schwebel in shutting down the credit and turning off the goods of Textura.

I think, your Honor, that in this concentrated industry that the communications between these people have to be subjected to a higher degree of judicial scrutiny than would obtain in a less concentrated industry because

of the dire effect. If there are three people and one person says to the other two, "Look, we are going to do this, why don't you go along," and I am suggesting that is what these communications said, the consequences are terrific, that the company's source of supply dries up, it can't sell goods because it doesn't have any, and if they shut down, as we claim they do, the extended credit term, it can't generate cash and doesn't have fabric and doesn't have any place to go.

THE COURT: You are not suggesting that price fixing either in industrial or decorative fabrics drove this company out of business?

MR. BURGESS: No, I am not, your Honor.

THE COURT: So price fixing is out of the picture here absent a showing -- I would be interested to know what damages you have shown on industrial price fixing.

MR. BURGESS: We feel we do have damages in industrial price fixing, your Honor.

THE COURT: All right, I will wait.

MR. BURGESS: Your Honor, again I want to make this point, and that is that I think it is clear, suggested in the cases that while you may not necessarily be able to cite one type of antitrust violation as to show a proclivity to commit other antitrust violations, neverthe-

Mr. Powrie submitted conclusive evidence that a fabric finished by them had in fact been defective as a result of something Clark-Schwebel had done. It is not only the matter, your Honor, of who is right and who is wrong, but the delay of Clark-Schwebel in even answering Mr. Powrie's complaints is important here.

Then what happened is this, and Mr. Nordheim had made admissions that bad quality deliveries were made -- what happens now? Textura takes a credit in order to provoke resolution of these credits. Clark-Schwebel invoices Textura for all the goods it was holding in the warehouse, terminates Textura's credit, holds up its orders and refuses to process new orders. These moves were all unprecedented, never had been done before.

We suggest, your Honor, that on the record the jury could find that rather than being an appropriate reaction to Textura's actions, Clark-Schwebel was simply using this as an excuse to carry out a predetermined policy and in the background of this remember that Jack Schwebel has testified that he was unhappy about Textura, that he was --

THE COURT: Supposing Clark-Schwebel had all of these motives and intentions that you talk about; you would also have to show that other parties were privy to

these motives in intention and going along wittingly with Clark-Schwebel.

MR. BURGESS: I have to show a conspiracy, your Honor, but I don't think I have to show that they had the exact same motive, as long as they had a motive to take the same action Clark-Schwebel did, and I think we showed they had motive as to the manner of the complaints by their customers and the fact that they had their own quality complaints from Textura.

THE COURT: Wouldn't it depend on whether they were protecting their own interests and taking the same action as Clark-Schwebel?

MR. BURGESS: Of course, your Honor, but that is a jury question.

THE COURT: I am not saying it isn't, but in the light of the evidence -- you can paint a very black picture, although I don't say that, but that doesn't lead you into a conspiracy on the part of the other two defendants here.

MR.BURGESS: Well, your Honor, I think that in order to prove the conspiracy we at least have to establish the facts of what Clark-Schwebel in fact did, that they solicited the other people to join with them in doing this.

THE COURT: Well, you know the law of conspiracy,

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MR. BURGESS: Yes, your Honor.

THE COURT: So these are what we are talking about, namely, the first cause of action.

MR. BURGESS: Yes, your Honor.

THE COURT: And eliminated from that, of course, is paragraph 25 of that particular portion of the amended complaint which was the monopoly allegations under Section 2 of the Sherman Act which you tell me are out.

MR. BURGESS: Yes, your Honor.

THE COURT: So that's the first cause of action.

MR. BURGESS: Well, your Honor, I think subsequently in the pretrial order the issues were formulated so that the price-fixing was all put in one series of allegations, and the allegations dealing with the conspiracy to put Textura out of business, which I have been speaking to, were separate.

THE COURT: I will take a look at the pretrial order again tonight.

I am just trying to clear it up in my mind.

Now, the second cause of action, that's the [illegible] that's out, am I right?

[illegible] Yes, your Honor.

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think there is ample evidence --

THE COURT: I am not necessarily agreeing with him, but what I am trying to make up in my mind is whether there is sufficient to go to the jury on the first cause of action. That includes whether there is (a) any damages shown with respect to price-fixing, and the other is whether the damages are so beyond the bounds of reason that --

MR. BURGESS: Your Honor, you are addressing the amount of damages or the facts of damages?

THE COURT: Yes, yes, I think you took too big a bite here. At any rate, is there anything anybody else wants to add?

MR. BREINDEL: In connection with the damages on industrial price-fixing I just want to point out Mr. Travis testified at approximately page --

THE COURT: This is what you were going to tell me tomorrow, but you can tell me now.

MR. BREINDEL: At approximately page 1400 he testified as to percentage increases during the period from 1960 to 1966.

He wasn't employed by Burlington prior to 1960. I think the jury can infer from that that that was the same practice prior to 1960. In any

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event, I would point that Plaintiffs' Exhibits 710, 711, 736 and 738 all cover purchases of industrial fiber glass during that period that Mr. Travis testified about.

In addition, in general as to damages there has been a profit projection that may have been overlooked, and that is Plaintiffs' Exhibit 48, which was Mr. Friedman's profit projection, a projection which was made at a time when there was no thought of litigation.

THE COURT: Does anybody else have anything to add?

MR. TOPKIS: I don't think so, your Honor.

THE COURT: I take it that we are dealing then with the first cause of action, with price-fixing out of that picture, and with the question of whether Mr. Powrie is still a proper plaintiff in the case.

MR. TOPKIS: As to that, might I add a word, your Honor. I neglected to say this, but the record I think is quite clear that whatever Mr. Powrie's status as a target or nontarget, in 1967, the first year after Textura's business life came to an end he made more money than he ever ahd before, and he then voluntarily, as he told us, went into another line of business. On those facts it seems to me he can't very well claim

that he was penalized or suffered by any action of defendants.

MR. BURGESS: I would like to add one thing and that is there was a specific loss suffered by Mr. Powrie in making good on a loan.

THE COURT: I am aware of that. But there you have the situation of a creditor or a stockholder or -- well, I'll think about it. I'll see you in the morning.

MR. TOPKIS: Just one final thing, your Honor, unrelated to what we have been suffering, but I think in fairness to the court I should say that we are going to be using a razor tonight on our case.

THE COURT: Using a what?

MR. TOPKIS: A razor on our case. I am hoping to cut it down to a very --

THE COURT: I have been trying to see where we are.

MR. TOPKIS: Right.

THE COURT: They have taken the Robinson-Patman out, they have taken Section 2 of the Sherman Act out. I have eliminated price-fixing so far as decorative fabrics are concerned, and we have the only issue in respect to the industrial fabrics price-fixing,

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and what damages have been shown. I suppose we have with respect to those damages the question of what went from Glass Fabrics to Textura, whatever the sales or damages that they suffered by reason of this price-fixing. It might not even be worth anybody's time, but I don't know what the figures are.

MR. TOPKIS: I think it quite possible, your Honor, that defendants' case will be done some time tomorrow.

THE COURT: What I have tried -- one of my purposes in getting you together on this now is to try and -- I have to try, of course, to prepare the charge. I am going to have to do some cutting too.

Well, see you in the morning. I would like to think it over a little. My present inclination is to leave the first cause of action in. If we run into a problem on damages, then we run into the problem of damages, and you can submit the issue separately to the jury.

Okay.

MR. TOPKIS: What time tomorrow, your Honor?

THE COURT: I told the jury to come back at 10:30. I still would like to think this

CARLYLE MICHELMAN, Trustee of Textura, Ltd., in Bankruptcy Proceedings, et al.

vs. 66 Civ. 4230

CLARK-SCHWEBEL FIBER GLASS CORPORATION, et al.

New York, November 7, 1974;
10.25 o'clock a. m.

(Trial resumed.)

- -

THE COURT: I am sorry to keep you waiting, but we had some jurors still missing and one was delayed.

I don't have the minutes from last night, but I suppose we will get them before the day is out.

I think there is no question in my mind but that Fenestra is not a proper party. It is merely an alter ego of Textura. I have just gotten this memorandum with respect to Mr. Powrie and I will reserve on that until the close of the defendants' case. I still have serious questions. You are, I am afraid off base on the law of the case and I think it comes down to the trial judge to determine who is or is not a proper party, if the Court has taken evidence and has something on which to base the decision on whether a person is or is not a proper party.

As I see the case now, in the same light as I

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has no evidence to submit to the court on the defense.

THE COURT: All right. We will look to see if the jury is here.

MR. BURGESS: I would like to see one more thing. I have some documents left at ny office. I am waiting for a messenger to come down with the documents I am going to use, and I request we wait a few minutes to see if we can get the.m

THE COURT: I assume we can probably finish up today. Whether we will get around to charge tomorrow I don't know.

How long will your summations be?

MR. TOPKIS: I will wait to hear what the plaintiffs have to say.

MR. BURGESS: You go first.

MR. TOPKIS: I go first when I put in no defense? I don't think so.

MR. BURGESS: This has been kind of a marathon in some sense because we were expecting a somewhat longer case from the defendants than they are putting in, and, frankly, I have no real estimate as to how long the summation is going to take at this point.

THE COURT: It won't take more than hour, will it?

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MR. BURGESS: I don't know, your Honor. I hope not. I think we can accomplish it in that period of time.

THE COURT: I will consider the matter as to who will open and who will close. Some of the people may put in defenses and you won't.

MR. TOPKIS: For all three of the defendants there will be one brief witness, and there will be a few documents, and that's it. It seems to me at this point we are entitled, since we began with case that was as unlimited as the orbit of the earth, we ought to have the plaintiff finally tell us what they think they have proven.

MR. BREINDEL: I am not aware of any precedent to change the closing order because defendants have sought to put in a limited amount of witnesses.

MR. TOPKIS: To begin with, there is no established order.

THE COURT: There is no established order.

MR. BREINDEL: The customary order is obviously for the defendant to sum up first.

MR. TOPKIS: That is not so. That practice varies with each individual judge and, as a

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matter of fact, some data we collected a few years ago demonstrate in 90 per cent of the jurisdictions around the country the plaintiffs sum up first.

MR. BREINDEL: I think in this jurisdiction it is customary for the defendant to sum up first.

MR. TOPKIS: You can go around the various judges and find it varying.

THE COURT: It varies here.

MR. BREINDEL: May we get a ruling on that, your Honor?

THE COURT: I will give you a ruling.

We will take a short recess. We are waiting for some papers.

How soon do you expect them?

MR. BURGESS: Another five or ten minutes.

(In open court; jury present.)

MR. HARDISON: Your Honor, we call James P. Garvey.

J A M E S P. G A R V E Y, called as a witness by defendant Burlington, being first duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. HARDISON:

Q Mr. Garvey, what is your present business association?

A I am president of Burlington Factoring, a division of Burlington Industries.

Q What is the factoring division of Burlington Industries?

A What's a term to describe the credit function of Burlington Industries.

A It used to be called the credit department. In recent years we changed it to factoring.

Q Is it in effect the credit department?

A It performs the credit function. It is the credit department.

Q Mr. Garvey, we have had a lot of testimony in this case about credit men. I am not sure that we have ever had any explanation for the jury as to what

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a credit man does. In as few or as many words as you have to, will you tell us what a credit man does?

A Well, in the average business a company obtains orders from customers, and those orders must be processed through the credit department before they can be accepted and confirmed by the sales division, which means that the customer is going to be shipped goods on terms of credit, and the credit man is the one who makes the determination as to the credit worthiness of that customer. And if he approves a credit, then the order is consummated and the goods are shipped to the customer.

Q How long have you been with the Burlington credit department?

A Since 1948.

Q Do you hold any college degrees?

A Yes. I have a Bachelor of Science, degree, major in accounting, from New York University.

Q Will you tell the jury approximately how many credit men are employed in the Burlington credit department?

A Approximately 50.

Q About how many accounts does the credit department handle?

A I would estimate that we probably had about half that number at that time because our volume was about half of what it is today.

Q And at that time, 1958-1966, were specific accounts assigned to individual credit men?

A Yes. We assigned specific accounts to a group of credit men. Our credit men worked in groups or in teams. So that if any one credit man is absent or out on business out of the office there are two or three other men who can take over and handle that particular account, fill in for the man who is absent.

Q Would you briefly describe for the jury the types of records that the credit department maintained?

A The main record that a credit department maintains is a credit file which we have on each specific customer. The credit file contains various types of information, such as financial reports, balance shee profit and loss statements, bank information, commercial agency reports, such as Dun & Bradstreet, trade supplier information. That means we obtain the history and experience of that customer with other trade suppliers in order to determine the amounts of credit they are extending and the manner in which they pay their

Q Are Mr. Schutz and Mr. Donnelly alive today?

A No, they are both deceased.

Q How about Mr. Kelly?

A Mr. Kelly is retired.

Q Are the sales departments of Burlington Industries independent of the credit department?

A Yes, sir.

Q Are the sales departments responsible for credit losses?

A No, the credit department is responsible for credit losses, not the sales department.

Q You testified a moment ago that in the course of your duties as a credit man you considered certain types of information. I wonder if you would briefly review the types of information that you look for when you are reviewing a credit account.

MR. BREINDEL: Objection, unless we know what period of time we are talking about.

THE COURT: I thought the questions were directed to 1958 to 1966.

MR. HARDISON: Yes, your Honor.

THE COURT: Overruled.

THE WITNESS: In order to determine the

credit worthiness of any specific customer we would review the financial condition of a customer, the performance of the customer. That means the operating trend, whether or not the customer has been losing money over a period of time or making money, making profits. We would review it from the viewpoint of whether or not they are paying their bills promptly with us and others in the industry, whether or not the concern at a given date has a lot of past due indebtedness with us and with the other trade suppliers.

Q Does the term "working capital" mean anything to you?

A Working capital is one of the elements that we take into consideration in determining the worthiness of a company's credit.

Q Would you define for the jury the term "working capital"?

A Working capital is the difference between the current assets on a balance sheet of a company and the current liabilities. Current assets consist of cash, accounts receivable, merchandise. The current liabilities are all liabilities due within a year to banks or trade creditors, and so forth.

Q Is there any rule of thumb that you as a

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credit man would apply in assessing the working capital of one of your customers?

A There is no rigid rule, but normally we consider the working capital to be -- rather, we consider the balance sheet to be in satisfactory proportion or condition if the current assets usually equal at least two times the liabilities, amount to two times the current liabilities. That is considered as a current ratio, which means that the working capital usually should be adequate for the performance of the companies business.

Q Is that current liabilities?

A Current liabilities.

Q Is working capital a meausr of the ability of a customer to pay his bills?

MR. BURGESS: I object to this line of questioning on the grounds there is nothing to tie it specifically to the account in question in this case. It is just a lot of general information.

THE COURT: Are we going to get to the account in question?

MR. HARDISON: Very quickly, your Honor.

THE COURT: All right.

Q Mr. Gravey, you stated a moment ago the

Q Would you tell the jury what determined at that time whether Burlington would seek a personal guarantee from --

A We normally would not seek or request a personal guarantee unless we were more concerned about the credit risk involved than we would in a normal case. If the credit risk was poor or bad or we were concerned about the trend of the business, we would then request a personal guarantee for added protection in case the corporation were not able to pay its bills when they matured, and then we could look to the guarantor.

Q Are you familiar with the plaintiffs in this case, Textura and Malcolm Powrie?

A Yes.

Q Textura Glass Fabrics?

A I am.

Q You are familiar with those three names?

A Yes, sir.

Q Directing your attention to 1958, do you recall a meeting with Mr. Powrie in September of 1958?

MR. HARDISON: In that connection, your Honor, I had these exhibits pre-marked by the clerk before we convened today and I will refer to these by the previous designation as well, Mr. Burgess.

been no showing that his recollection needs refreshing.

THE COURT: We have a good deal already in on that, but if you want to question him on all these items --

MR. HARDISON: I didn't hear you, your Honor.

THE COURT: Do you want to question him about this visit? You can refresh his recollection --

MR. HARDISON: Yes.

Q Do you recall a meeting with Mr. Powrie on or about September 25, 1958?

A I definitely do, when I review the memorandum I have before me, yes.

Q What do you remember about that meeting, aside from the memorandum? Do you have any present recollection of that 1958 meeting?

A I wouldn't have any specific recollection other than a general one, without reading the document.

MR. HARDISON: Your Honor, I think the document is the best evidence of the meeting.

THE COURT: The objection is overruled.

MR. BREINDEL: Your Honor, we have one further objection:

We have no objection to it now coming into evidence as far as those portions which relate to what he said to Mr. Powrie and what Mr. Powrie said to him, but there

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are portions of this memo which deal solely with this witness' mind and intentions, his mental impressions, which are in no way relevant.

MR. HARDISON: I think that is highly relevant, your Honor. We are an alleged conspirator in this case and our state of mind, purposes and intentions, it seems to me, are relevant.

MR. BREINDEL: Your Honor, I direct your attention to the last paragraph on page 2 and specifically ask that that be deleted.

THE COURT: Well, some of it is factual.

MR. BREINDEL: I have no objection to anything that Mr. Powrie said to him and he said to Mr. Powrie. His mental impressions are in no way relevant.

THE COURT: This is also a business entry.

MR. BREINDEL: To the extent a document can come in as a business entry is to the extent it reflects a transaction, not a mental impression.

THE COURT: With respect to that, I would only strike the first sentence in that paragraph.

MR. BREINDEL: That is sufficient, your Honor.

THE COURT: Before showing it to the jury, we will have to take out the first sentence in the last paragraph, second page.

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MR. HARDISON: Fine, your Honor.

(Defendants' Exhibit AW was received in evidence.)

Q Mr. Garvey, except for the first sentence in the last paragraph, and with his Honor's permission, would you please read to the jury the last two paragraphs on page 2?

A "We discussed his order position with Hess-Goldsmith along the lines of trying to give Mr. Colton of Hess-Goldsmith some assurance on the approximate $40,000 worth of merchandise on order and in work that he has for Glass Fabrics. I told Mr. Powrie the only suggestion I could make to satisfy Mr. Colton would be either to give us his personal guarantee covering the goods on order or put up a deposit satisfactory to Mr. Colton to assure completion of the contracts. He declined to consider either suggestion and said that until a balance sheet is issued to our liking at the end of the year, he would like to continue on the basis he has during the past year, that is, taking goods in on cash but have the merchandise finished and shipped out to California where he could pick it up as he needs it and give us a check for it. I told him that this was a decision that Mr. Colton would have to make."

I am not to read the first part of that?

the bottom of the page which I will refer to in just a moment.

Q Mr. Garvey, to you remember at that September 25, 1958 meeting Mr. Powrie telling you that he had an agreement with the sales department for terms of three to four months?

A No, sir, I do not.

Q I believe that the memorandum which you have just read from indicated that Glass Fabrics' terms were cash at the time of the meeting on September 25, 1958.

MR. HARDISON: I would like to show the witness Defendants' Exhibit BT for identification.

Q Could I ask you to identify Defendants' Exhibit BT for the jury?

A These are ledger sheets recording the transactions between our company and Glass Fabrics.

Q For what period of time are these ledger entries made?

A They start with November 1956 and run through --

MR. HARDISON: I think we can stipulate it is September 1962, can't we, Mr. Burgess?

MR. BURGESS: Yes.

A And they run through September 26, 1962.

MR. HARDISON: May we also stipulate that

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Defendants' Exhibit BT, if you will, Mr. Garvey, did Glass Fabrics' terms change some time in 1959?

A Yes. On March 20, 1959 we resumed regular terms of 30 days, net 30 days.

Q How did that come about?

A That was the result of getting an audited financial statement that we had not had previously. In the past we did not have a statement prepared by an independent certified public account, which is what we requested. When we got that, as of December 31, 1958, then we were willing to extend credit again on normal terms.

Q What was the state of Glass Fabrics' balances with Burlington in the first quarter of 1959?

A Well, the first quarter would end March 31. We just started making estimates on regular terms then. You mean the second quarter?

Q For example, on March 1, 1959, what was the state of Glass Fabrics' balance with Burlington?

A On March 1 the balance was $1900.

Q Would you review the ledger sheets briefly for the year 1959 and tell the jury whether or not those ledger sheets reflect the payments made to Burlington by Textura, that is, the period of time within which the

invoices were paid?

MR. BREINDEL: I think you meant Glass Fabrics?

MR. HARDISON: Glass Fabrics, excuse me.

A The payments were made promptly, at the beginning of that --

Q I am just asking now if that document does reflect the period of time --

A Yes, all payments are recorded on the ledger sheet, payment dates.

Q What do those entries reflect with respect to payments by Glass Fabrics during 1959?

A During the first part of 1959 they were paid promptly. Then during July they began to slow up and were running about 30 days slow.

Q By "promptly," what do you mean, Mr. Garvey?

A Paid in approximately 30 days, at the time of the maturity of the invoice. The invoices were rendered on 30 days and if the payment were received in approximately 30 days, we consider that prompt. If they paid the bill 30 days late, we consider that 30 days slow, of course.

Q Coming up to 1960, did there come a time during that year when Mr. Powrie asked the sales department to extend terms of 60 days? Do you have any recollection

of that?

A I don't recall. It is not on the ledger sheet here.

Q Let me show you, Mr. Garvey, Defendants' Exhibit AX for identification.

Would you identify that document, Mr. Garvey?

A This is an inter-company memorandum sent to me on June 28, 1960 from Mr. Donnelly, the head of our Los Angeles credit department, regarding Glass Fabrics.

Q Did you receive it on or about that date?

A Yes, sir.

MR. HARDISON: I offer Defendants' Exhibit AX in evidence.

MR. BURGESS: May we have a moment to read this, your Honor? We have not seen this document.

(Pause.)

MR. BURGESS: Your Honor, there is some writing on the bottom of this that I can't read. Other than that, I have no objection to it.

MR. HARDISON: I will identify the writing in just a moment.

THE COURT: Received in evidence.

(Defendants' Exhibit AX was received in evidence.)

cax

THE COURT: It is received except for the writing, until the writing is identified.

Q With his Honor's permission, Mr. Garvey, would you please read the first paragraph --

THE COURT: Has that been identified?

MR. BURGESS: Yes, your Honor.

Q Would you please read the first paragraph of that document?

A "Recently Paul Erskine had a request from Mal Powrie for extended terms in connection with future purchases. Apparently he started out by requesting 90 days but then modified this request to 60 days. As may be seen from the photostat of the recent ledger card, our payments are draggy and apparently Stevens is having similar experience. According to Powrie, Stevens does not bother him as much as we do inasmuch as they apparently do not employ a past due follow-up along the lines of Burlington. Our collection file indicates that for the past several months it has been necessary for us to call them approximately every ten days to two weeks and as indicated by the payment received today, the account is late from 27 to 50 days. In addition, there is approximately $6500 presently overdue up to 38 days."

Q Could you identify the handwriting at the bottom

Is that document?

A That is my handwriting.

Q What is the date beside the handwriting?

A June 30.

Q What year?

A 1970.

MR. BURGESS: Your Honor, could we ask Mr. Hardison to read the second paragraph?

THE COURT: Yes.

MR. HARDISON: Well, you can read it on cross-examination, Mr. Burgess.

MR. BURGESS: Well, I will read it now.

THE COURT: You can read it now.

MR. HARDISON: Do you want Mr. Garvey to read it or do you want to read it?

MR. BURGESS: Either way.

Q Will you read the second paragraph?

A Of the handwritten note?

Q The second full paragraph of the memo.

MR. BURGESS: Read the rest of the memo.

A "Lowrie insists he is not overdue to the extent indicated by the financial statement with accounts payable [illegible] Plus normal purchases of only $52,000 for [illegible] the period. Claims that his

request for extra time is occasioned by the fact that he has been getting substantial installation contracts from such people as Kaiser Industries and has worked several Capehart housing projects in which it is necessary for them to tie up considerable sums and with technicalities, red tape, et cetera, collections are slow in coming in. This does not borne out by accounts receivable of only $57,000 at Dec 31 compared to average sales of $80,000 per month in the five-month preceding period. This too could be deceiving since, as you probably remember, they have a private factoring deal financed personally by Powrie and three other individuals known as Pepco. The reserve with Pepco is $6000 and represents approximately 20 per cent of the amount sold to the factor, with the gross receivables in contra-payable item eliminated from the balance sheet. In view of the manner of payment, the request for 60 days is rather academic and possibly revolves around the fact of whether or not we charge interest, which Powrie won't pay anyway. We want to discuss this further with Bob Zimmerman of Rashba & Pokart, who is out of the city, but Powrie is pushing for an answer . I say if we don't want to do business, he will give it [illegible] We would appreciate your thoughts on this [illegible]

Q Would you also read the handwriting --

THE COURT: Whose handwriting is it?

THE WITNESS: That is my handwriting, your Honor.

MR. HARDISON: I will offer this in evidence, your Honor, as well as the typewriting.

THE COURT: Received in evidence.

A "Donnelly phoned. I told him to have accountant give him an aging of accounts payable with a June 30, 1960 balance sheet and also generally observe the inventory. Told Larry to have distinct understanding with customer when offering 60-day terms that:

"1. Bills will be paid promptly; 2, that we don't intend to double the recent high credit of $40,000 without guarantees."

Q Those are your initials?

A Then I signed my initials under that.

Q What was the date of this document?

A June 30, 1960.

Q Coming to the year 1961, do you recall whether you had occasion to review the Glass Fabrics year end statement for December 1961?

A I generally recollect that I reviewed the statements that were received each year, but I don't remember specifically.

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Q Will you refer back to Defendants' Exhibit AY, which is the March 20, 1962 memorandum, Mr. Garvey.

Do you have that document before you?

A Yes, sir.

Q With his Honor's permission, will you read the second paragraph of that document which I omitted to ask you to read a moment ago.

"A I think the situation calls for a firmer attitude and I would insist that a substantial amount of additional capital be put back into the business. For continued liberal credit I think we should also insist on the guarantees of Powrie and his wife."

Q Did there come a time in 1962 when the Burlington credit department asked Mr. Powrie for a personal guarantee?

A I don't recall definitely, but I presume so based on my memo here. I suggested it to Mr. Donnelly.

MR. HARDISON: Let me show the witness Defendant's AZ for identification.

MR. BURGESS: What number is that?

MR. HARDISON: 493.

Q Does that document refresh your recollection?

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A Yes, sir.

MR. HARDISON: I offer Defendants' AZ in evidence.

MR. BURGESS: No objection.

THE COURT: Received in evidence.

(Defendants' Exhibit AZ was received in evidence.)

Q Will you read the second paragraph.

MR. BURGESS: At least read the whole thing.

A "March 27, 1962. File Memo." This is my memo for the file.

"Larry Donnelly visited this customer yesterday along the lines of our memo of March 20th and was assured by Hal Powrie, the principal, that this is the year that he is going to build up the capital of the business. He has intentionally been drawing most of the substantial money out of the business in order to obtain the capital stock of the other stockholders. He and a Mr. Johnstone, the other principal stockholder, have just about achieved this with a small number of shares still left in the hands of a few stockholders. He said that he will have another $100,000 shipping month in March and will earn an additional good profit so that

for the quarter ended March 31st the condition should be substantially improved. The accountants, Robarge & Prokart, prepare figures quarterly, and we will see if Powrie lives up to his statements.

"Larry brought up the subject of personal guarantees again and was flatly refused, but if the business develops as we are told it will during the balance of this year we should be able to handle the account without it. Our reason for being so liberal with this customer is that it is the only decorative account Hess-Goldsmith has on the Coast and they would be extremely disappointed if we had to pull the account down substantially or get out of it."

Q With reference to personal guarantees request, do you recall if such a request was in fact made?

A Not specifically, I don't recall.

Q Let me show you Defendants' Exhibit N in evidence. That is a letter dated May 15, 1964, from Mr. Donnelly to Mr. Powrie.

MR. HARDISON: I believe it is stipulated, isn't it, Mr. Burgess, that this letter transmitted guarantee forms -- I think I got ahead of myself. Let me hold that up. I apologize.

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THE WITNESS: They are on our ledger sheet.

MR. HARDISON: The witness testified they are on the ledger sheets.

THE COURT: He can answer the question.

BY MR. HARDISON:

Q First of all, what were the terms, Mr. Garvey?

A Net 30 days.

MR. HARDISON: May I have the previous question back?

(Question read.)

MR. BURGESS: Your Honor, I believe we already stipulated in the plaintiffs' case that they ran substantially over the term stated on the invoices, and in fact that they ran, according to the dates written in in the columns on these schedules, so if Mr., Hardison wants to review it again I have no objection, but we have already done it.

Q Just briefly, please?

A The payments generally ranged anywhere from 60 days to four or five months, instead of 30 days.

Q Did there come a time in1964 when Burlington's credit department asked Mr. Powrie for a personal

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quarantee in connection with the account?

A I don't recall.

Q Let me show you at this time Defendants' Exhibit N in evidence, which I think is beforeyou.

Do you have a copy of Defendants' Exhibit N?

A May 15th?

Q Yes, May 15, 1964.

A Yes, sir.

Q Would you identify that document?

A This is a letter written by Larry Donnelly to Mr. Powrie on May 15, 1964.

Q And that letter purports to transmit guarantee forms to Mr. Powrie?

A Yes.

MR. BREINDEL: Objection. There is no testimony the witness has ever seen this document and he is asked to interpret a document written by somebody else and sent to somebody else.

THE WITNESS: I have seen this letter. I get copies of all these letters --

Q Mr. Garvey --

THE WITNESS: -- in the New York office.

MR. BREINDEL: I didn't say you didn't.

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I said there had been no evidence to date that you had seen it, Mr. Garvey.

THE WITNESS: Excuse me.

Q Mr. Garvey, did you see this letter at or about the time it was prepared, a copy of the letter?

A Yes, I did.

Q And does that letter refresh your recollection as to whether a personal guarantee was requested of Mr. Powrie in 1964, and does it refresh your recollection as to whether such forms were actually sent to Mr. Powrie?

MR. BURGESS: Your Honor, haven't we stipulated already? Isn't this already in evidence that there was a request in 1964?

MR. HARDISON: What's the objection. I thought we were objecting.

MR. BURGESS: It seems to me we are going over ground that's already been covered in the cross examination of Mr. Powrie.

Q Does it refresh your recollection, Mr. Garvey?

A Yes, it does. It indicates that Mr. Powrie had a conversation with Mr. Powrie requesting a guarantee, and he stated that he was going to send the

guarantee forms to Mr. Powrie for that purpose.

Q Do you recall whether Burlington received a personal guarantee from Mr. Powrie in 1964?

A I don't recall.

Q Do you recall whether Glass Fabrics had a profit or loss at the end of 1964?

A No, sir, I do not.

Q I show you a copy of Defendants' BB for identification.

MR. HARDISON: The previous number was 498, Mr. Burgess. Also, Plaintiffs' Exhibit 20.

Q With reference to Plaintiffs' Exhibit 20, Mr. Garvey, do you recall receiving a copy of that statement? I guess it would have been some time in 1965.

A Yes.

Q Did Glass Fabrics have a profit at the end of 1964.

MR. BURGESS: Your Honor, we stipulate there is a loss shown in the balance sheet.

Q Does the balance sheet reflect an amount of net loss?

A Yes. $113.00 was the net loss for the calendar year ended December 31, 1964.

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Q Does the balance sheet reflect the working capital of Glass Fabrics?

A The balance sheet shows a working capital deficit, a minus working capital, of approximately $100,000 on that date.

Q Did that represent a solvent condition?

A It represented an insolvent condition.

Q A moment ago I handed you a copy of Defendants' Exhibit BB for identification. Do you have that before you?

A Yes, sir.

Q Can you identify that document?

A This is a memorandum for the credit file prepared by Mr. Harry Donnelly in our California office.

Q What's the date?

A April 2, 1965.

Q Did you have occasion to see a copy of this memorandum at or about the time it was prepared?

A I did.

MR. HARDISON: I offer BB in evidence.

MR. BREINDEL: A question on the voir dire.

tainment likewise exceeded projections by approximately $10,000. The latter item was particualry high by reason of the fact that Powrie made several eastern trips in connectionwith obtaining sole United States rights to the Mo-Vac process and in connection with the opening of a pilot plant operation for that process.. The expenses of Messrs. Grafstrom and Porter were also absorbed. These figures alone accounted for approximately $70,000 in excess of projected figures."

Q Mr. Garvey, on the second page --

MR. HARDISON: Your Honor, to save the witness may I read portions of the second page?

THE COURT: Yes.

(Mr. Hardison read to the jury from Defendants' Exhibit BB in evidence.)

THE COURT: We will take a short recess.

(Recess.)

BY MR. HARDISON:

Q Mr. Garvey, the memorandum you were discussing a moment ago, Defendants' Exhibit BB for identification, stated that at the meeting Mr. Powrie told Mr. Donnelly, he says he now realizes he must support the company and he will sign our personal guarantee form.

Do you know whether such a guarantee was in

fact signed in 1965 by Mr. Powrie?

A I don't recall specifically.

Q I show the witness Defendants' BC for identification.

MR. HARDISON: The previous number was 354. Have you ever seen that document before?

A Yes, I have.

Q What is the date of the document?

A It's dated April 9, 1965.

Q Did you see this document on or about that date?

A Yes.

MR. HARDISON: I offer BC in evidence.

MR. BURGESS: No objection.

MR. HARDISON: Is it stipulated this is in fact the personal guarantee Mr. Powrie signed April 9, 1965?

MR. BURGESS: So stipulated.

(Defendants' Exhibit BC was received in evidence.)

Q Does that document have an expiration date, Mr. Garvey?

A Yes, sir. It has an amendement stating "The guarantee covers orders placed with you prior to

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December 31, 1965 only."

Q Did you have occasion to review the extra financial statement at the end of 1965? Let me show you a copy of --

MR. BREINDEL: We have already stipulated Mr. Hardison can read in the profit or loss figure. I think it is irrelevant whether or not the witness reviewed it unless he took some action thereon. None of these documents deal with any action this witness took.

MR. HARDISON: I think they bear on the decisions of the credit department of Burlington.

MR. BREINDEL: They might if you show this witness participated in the decisions. The evidence shows he met with Mr. Powrie in 1968 and introduced him to Mr. Colton and no evidence of any dealings thereafter.

MR. HARDISON: We have evidence Mr. Garvey arranged for the matter of the personal guarantee by Mr. Powrie.

THE COURT: You can go ahead.

BY MR. HARDISON:

Q I show you Plaintiffs' Exhibit 36 in evidence, which is the Textura audited statement at the end of 1965.

Did Textura have a loss or a profit in

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1965?

A The 1965 operations resulted in a loss of -- an operating loss of $36,000.

Q Do you recall, Mr. Garvey, whether the Burlington credit department in 1966 asked Mr. Powrie to renew the personal guarantee you saw a moment ago which was limited to 1965?

A I believe we did, to the best of my recollection.

Q I show you Defendants' Exhibits BE and BF.

MR. BURGESS: What are the previous numbers?

MR. HARDISON: One of them is 502 and the other -- I am sorry; that was Defendants' Exhibits BE and BF for identification. BE had no prior designation. That's a memorandum dated January 5, 1956.

BF was 502.

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Exhibit BF in evidence.)

Q Mr. Garvey, did there come a time when Mr. Powrie visited New York shortly after this memorandum for a meeting with Mr. Schutz? Do you recall?

A I don't recall.

Q Do you recall having occasion to review the financial condition of Textura some time in April of 1966?

MR. HARDISON: I show the witness Defendants' Exhibit BG for identification, the previous marking being 504, your Honor.

Q Government's Exhibit BG for identification, Mr. Garvey, is what?

A This is a memo dated April 5 from Mr. Donnelly to Mr. Kelley, interoffice memo.

Q What is the date?

A April 5, 1966.

Q There is some handwriting across the bottom?

A Yes, that is my handwriting.

Q Does this refresh your recollection as to whether you had occasion to review the financial condition of Textura on or about that date?

A It does, yes, sir.

MR. HARDISON: I offer BG in evidence, your Honor.

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MR. BURGESS: No objection.

MR. HARRISON: Including the handwriting on the bottom of the page.

MR. BURGESS: I can't make out the handwriting.

(Defendants' Exhibit was received in evidence.)

MR. BURGESS: No objection.

Q Would you read the handwriting, Mr. Garvey?

A "Is definite working capital position that has existed on and off for the past seven or eight years," and I signed it, initialed it.

Q In the first paragraph of the memorandum it states:

"Ed," Mr. Powrie, "is presently in Dallas and will stop at Minneapolis before arriving in New York on April 11. Promised to visit with you, Mr. Schultz or Mr. Garvey, and said he would call for an appointment."

Do you remember having any such meeting with Mr. Powrie?

A I don't

Q [illegible]

A [illegible]

AFTERNOON SESSION

(2.20 p.m.)

(In the robing room, Chief Judge David N. Edelstein presiding.)

THE COURT: Gentlemen, I would be pleased if you could be seated for a few moments.

Gentlemen, shortly before Judge Tenney was to resume the afternoon session of the trial, a matter came to his attention which required his urgent and immediate response and, accordingly, he will not be able to continue this afternoon and it is very unlikely that he will be able to continue tomorrow, and I would say the earliest he would be able to resume this trial would be on Monday morning.

Accordingly, it is my intention to have the jury brought into the box and to explain in precisely the same terms I have just now done what the situation is and that we will be recessed until Monday morning.

Is there anything you wish to add?

MR. BURGESS: No, your Honor.

THE COURT: I don't know any of you, really, except as I see you by sight.

MR. TOPLIS: Is it a possibility that [illegible] able to resume on Monday [illegible]

THE COURT: I can't even be reasonably sure I am going to be here late this afternoon. I hope so.

MR. TOPKIS: I was wondering if we could make specific plans, your Honor.

THE COURT: I really can't answer that. As long as we are on that subject, let's go off the record for a moment.

(Discussion off the record.)

THE COURT: Is this witness a crucial witness?

MR. BREINDEL: I don't think so.

MR. HARDISON: He is our only witness, your Honor, Burlington's only witness, and we are almost through with him. I estimate about 15 minutes more on direct examination.

THE COURT: Then all you are concerned about is cross?

MR. BREINDEL: We are concerned about documents, your Honor, which I think it would be very difficult for you to rule on without a full background of the case, that they are trying to put in through this witness.

THE COURT: How many documents are involved?

MR. TOPKIS: I don't think there has been a problem about any documents and I don't think there will be on this witness, your Honor.

MR. BREINDEL: If there are no more documents --

MR. HARDISON: There are more documents, but they are business records.

THE COURT: Off the record.

(Discussion off the record.)

THE COURT: Would you please put a stipulation on the record authorizing this procedure and indicating your agreement to it before we get to the documents?

MR. BREINDEL: To be precise, your Honor, we are authorizing your substitution for the purpose of completing the last witness.

THE COURT: For all purposes with regard to this last witness with relation to this trial which has been on before Judge Tenney for approximately the past three weeks, and it is agreed that after witness' testimony has been taken under direct and cross-examination, that the next step in the procedure in this trial will be summation and charge and that the jury will be recessed, the case to resume on Monday at 10.30, is that correct?

MR. BREINDEL: With the exception that we may have a motion to make after the defendants complete their case through this witness.

MR. BURGESS: Which we will make on Monday, your Honor, assuming the case resumes before Judge Tenney.

THE COURT: Is that agreeable?

MR. TOPKIS: Certainly, your Honor.

THE COURT: My problem is Exhibit BK marked for identification, its illegibility.

MR. HARDISON: That is a problem with some of these documents, your Honor. I am Donald Hardison and I represent defendant Burlington Industries and it is my witness that is on the stand.

THE COURT: If this document is received, we will have a problem as far as the jury is concerned because of its illegibility.

MR. HARDISON: We will have to substitute some more copies, your Honor.

This is a case involving the allegation that the defendants combined and conspired to drive the plaintiff Textura out of business. Specifically, the means the conspiracy was effectuated by was an alleged agreement between the defendants with respect to the credit terms that would be extended to the plaintiff, who was a former customer of each of the three defendants.

This series of documents that I am offering at the moment relate to the decisions made by defendant Burlington with respect to that matter, the extension of credit terms to Textura and it is our position that these

(In open court; jury present.)

THE COURT: Ladies and gentlemen, I am Judge Edelstein, a member of this court. I hope you are not too overwhelmed with surprise to see a new face in this seat. The judge here almost immediately before, Judge Tenney, was about to come into this courtroom to resume this trial when he had to respond to a matter, and he had to respond to it immediately because of its urgency. Accordingly, he was not able to resume this afternoon.

I chatted with the lawyers in this case, who were all very gracious in their understanding about the problem that was presented. They inform me that there is one witness left, and that after this witness' testimony had been concluded that the case would be postured for various motions, summations, and then instructions by the court to the jury.

And so it was agreed by the court and counsel that I would sit in and preside today during the course of this trial and that after this witness' testimony had been completed that we would recess until Monday morning at 10:30, when it is my hope that Judge Tenney will be able to resume.

If you have any questions, if this explana-

tomers on credit terms, 60 days, 90 days, 30 days, and then the customer pays for shipment of that merchandise after the terms expire.

THE COURT: In extending credit do you have any procedures as to how to make a selection, a reasoned judgment or what?

THE WITNESS: Yes, sir, we have.

THE COURT: What's that?

THE WITNESS: We must have a complete credit file before we can make a credit judgment, and the credit file, depending on the type of risk we are addressing ourselves to, will have information of this nature, will have balance sheet information, will have bank information, will have agency information, will have credit information from other trade suppliers indicating how the customer is paying its invoices with those sources.

THE COURT: Is there a separate credit file for each customer?

THE WITNESS: For every customer we have a separate file.

THE COURT: And does that file purport to go back to the date you started doing business with them, and is it continuous and kept up more or less to date?

THE WITNESS: Yes, your Honor.

THE COURT: And before making a decision about granting credit, can you tell me generally how that is done? What steps are taken and who makes the decision?

THE WITNESS: The credit men make the decision.

THE COURT: If I ask you a question which is not entirely clear, please, may I have your indulgence, I am not an expert, and you are, so you just don't hesitate to correct me.

THE WITNESS: You are asking me on what basis we arrive at a credit judgment?

THE COURT: Yes. Before you decide how to ship merchandise or make a sale, how is it done, particularly since you tell me that most of your business is done on credit?

THE WITNESS: Yes. We review the various sources of information that we have obtained and that are in our credit file, and if that information meets the normal tests of creditworthiness the credit man will approve that order or will extend that credit on the regular terms of sale.

THE COURT: Then is it fair to say that

the sum total of your testimony in this area describinh the operation of the credit department and how you deal with your customers is that it is the regular course of business of Burlington to have a credit department, to check credit, to compile information regarding credit, and it is regular for them to keep such records.

THE WITNESS: Yes, sir.

THE COURT: And you do keep such records?

THE WITNESS: We do it in every case.

THE COURT: Are there any further questions?

MR. BREINDEL: Just one, your Honor.

BY MR. BREINDEL:

Q I believe you testified --

THE COURT: This is not cross examination, counsel. You do know the distinction.

MR. BREINDEL: Yes.

THE COURT: If you have further voir dire make it short.

Q Is there any policy in the credit department that transactions reflected in the internal memoranda must be reduced to writing immediately or shortly thereafter?

A What do you mean by transactions specifically?

THE COURT: I prefer to have the witness indicate that rather than you.

MR. HARDISON: I am sorry.

MR. BREINDEL: We will stipulate to that to save time, your Honor, with the same objection.

THE COURT: Thank you very much.

Received.

(Defendants' Exhibit BP was received in evidence.)

MR. HARDISON: Your Honor, I would like to read part of this memorandum to the jury, if I have your permission.

(Mr.Hardison read to the jury from Defendants' Exhibit BP in evidence.)

BY MR. HARDISON:

Q Mr. Garvey, there was a reference in the memorandum to Mr. Powrie intending to write to Mr. Schutz what his fabric requirements were going to be. Do you recall whether Mr. Powrie in fact communicated with the credit department on that subject?

A No, I don't.

Q May I show the witness Defendants' Exhibit AQ in evidence.

This is a letter to Mr. Schutz from Mr.

Powrie dated August 15, 1966. Mr. Garvey, do you recall seeing this letter?

A Yes, I do.

Q And the letter summarizes the rates at which Mr. Powrie or Textura called out fabrics over the past quarter?

A Correct.

Q And the totals for four styles of fabrics are 43,000 yards wi th a value of $53,930.

Mr. Powrie says:

"We have called out these fabrics during the past year at the below average quarterly rate."

Do you know whether this letter was in response to the conversation that the credit department had with Mr. Schutz which was referred to in the previous exhibit?

You may remember in Exhibit BP Mr. Schutz said that:

"Powrie promised to review all the information I have passed him verbally and would write me directly as to which merchandise he would like to have over what period of time."

A Yes, this would be in response to that conversation, and it was written on the same day.

Q There is specific reference to the fabric Crown. Mr. Powrie states:

"The weaving of Style 6011 has been suspended and if started immediately we would probably not have billings due on this style until December of this year (that's 1966) so the $53,900 for the balance of the year will most likely be closer to $26,000 to $35,000."

Do you know whether Burlington started to weave the fabric Crown after August 15, 1966?

A I don't remember definitely.

Q May I show the witness Plaintiffs' Exhibit 548 in evidence. Would you identify that document?

A This is another file memorandum prepared by Mr. Schutz relating to a telephone conversation with Mr. Powrie.

Q What'S the date of the document?

A August 25, 1966.

Q It reads --

MR. BURGESS: I would like to object. This memorandum has already been introduced, it's already been gone over, it's in evidence. I don't see any reason simply to sum up this case by the use of this witness putting document after document in front of him.

jury four exhibits which I have offered in evidence today, Defendants' Exhibits BB, BF --

THE COURT: When do you want that done?

MR. HARDISON: Right now, if I may, just so they may have them.

THE COURT: We don't have to pause for the jury to read each and every one of these documents?

MR. HARDISON: No, not at this time.

THE COURT: No further questions?

MR. HARDISON: No further questions.

MR. McGANNEY: Your Honor, may I ask some questions on behalf of defendant Schwebel?

CROSS EXAMINATION

BY MR. McGANNEY:

Q In the conduct of your business in the Burlington credit department have you had occasion to speak to Mr. Jack Schwebel?

A Yes, I have.

Q Has this been in person or on the telephone?

A Usually on the telephone.

Q How many occasions within the last year have you spoken to Mr. Schwebel?

MR. BURGESS: In the last year?

MR. McGANNEY: Yes.

on mutual customers.

MR. McGANNEY: Thank you. I have no further questions.

MR TOPKIS: Just a couple of questions on behalf of the defendant Stevens, your Honor.

CROSS EXAMINATION

BY MR. TOPKIS:

Q On occasion during the years 1965 and 1966 did you talk with people at J. P. Stevens about one account or another?

A I did.

Q Was that your regular practice?

A It was, and it continues to be.

Q Did you sometimes call somebody at Stevens and sometimes somebody at Stevens called you?

A We do that on a regular basis.

Q In response to his Honor's question, I believe you said you have thousands and thousands of accounts?

A Yes, sir.

Q Many of them in common with J. P. Stevens?

A Correct.

Q Is it your practice whenever a matter of mutual interest arises to consult J. P. Stevens?

A It is.

MR. BREINDEL: Your Honor, to make it clear --

THE COURT: It was indicated in the room that Mr. Cann seemed to be so completely imperative to establish the foundation, and perhaps that is what is needed.

MR. BREINDEL: We have no objection to it going into evidence so long as Mr. Hardison advises that Mr. Cann received the memo sent to him or, in fact, offered the memo --

THE COURT: Can you make that representation?

MR. HARDISON: I do, your Honor. To the best of my knowledge, that is the fact.

THE COURT: Very well, they are received without objection of any kind.

(Defendants' Exhibits BK and BN were received in evidence.)

CROSS EXAMINATION

BY MR. BURGESS:

Q Mr. Garvey, Mr. McGanney asked you about your conversations with Mr. Schwebel, and you said you have only talked to him over the past eight years, is that correct?

A To the best of my recollection, on a regular basis, I don't think it dated much before then.

Q Then you didn't talk to him in the years 1964 to 1966?

A Possibly not.

THE COURT: What do you mean by "possibly not"? You testified here that you had not spoken to him except for the last seven or eight years or maybe nine or ten and now you say possibly not in those years. Can't you give us your best recollection?

THE WITNESS: My best recollection is I did not speak to him during that time.

Q The persons you spoke to -- in response to a question by Mr. Topkis you said you spoke to persons from Stevens during the years 1965 to 1966.

Did you ever speak with them concerning the Textura account?

A I did, yes.

Q You did?

A Yes.

Q To whom?

A Knisel.

Q Do you know if he called you or you called him?

A I don't recall.

Q You don't recall.

THE COURT: Are these names familiar to the jurors?

MR. BURGESS: Yes, they are.

Q So there are some decisions, though, that were left for the merchandising department to make?

A All decisions relating to producing and selling goods are left to the merchandise department.

Q All those decisions relating to producing and selling goods?

A Correct.

Q In that connection you made a number of statements concerning the weaving of the fabric Crown. You wouldn't have any idea whether the weaving of Crown was suspended or not, would you?

A Yes, because Mr. Colton told us so. The sales division gave us that information.

Q That the weaving of Crown had been suspended?

A Correct. We got that from the sales division.

Q Thank you.

Now, Mr. Garvey, referring to these memoranda, let's take AX for identification. This is memorandum to you from Mr. Donnelly which reports on the a conversation which Mr. Erskine had with Mr. Powrie. So it is Erskine's report of what Mr. Powrie told him, then reported to Donnelly, and then reported to you.

THE COURT: May I interrupt you? Did

you say AX for identification?

MR. BURGESS: I meant AX in evidence. I am sorry, your Honor.

Q Now, you had no knowledge as to these conversations, did you?

A Yes. When I got this memorandum from Mr. Donnelly.

Q But you weren't personally there, Mr. Garvey?

A No.

Q You had no knowledge whether any of these statements stated that Mr. Powrie made in any of these memoranda are true or not, do you?

A Yes, I do. I can accept the memoranda we use for the basis of our credit function. It is a normal procedure of our credit operation to get a memorandum from any of our credit people, whether it is New York or California.

THE COURT: I think the information that is sought to be elicited is whether the information you have testified about is based on your own personal knowledge from your own personal conversation or whether it is based on these records that you kept in the regular course of business.

THE WITNESS: This particular memo is based on the records. Some of the information was based on personal knowledge.

THE COURT: We are only concerned at the moment with this particular exhibit.

THE WITNESS: Yes. This is based on the memorandum, the record I had sent to me by Mr. Donnelly.

THE COURT: So what you know about the matters in this memorandum you have learned because it is in the memorandum but you have no personal knowledge.

THE WITNESS: Correct.

BY MR. BURGESS:

Q So in fact, Mr. Garvey, as to AX you had no personal knowledge --

THE COURT: We have gone through that. Let's get on, please.

MR. BURGESS: Very well.

Q Referring to BB for identification --

THE COURT: Is it for identification or in evidence?

MR. BURGESS: No, BB in evidence, your Honor.

Q -- the same would be true, would it not?

A With this file memorandum?

Q Yes.

A Yes.

Q None of the matters stated in this memorandum you came to know of your own personal knowledge, isn't that correct?

A Correct.

Q And I think the same statement would be true of all the memoranda which were not offered by you, isn't that correct?

A Correct.

THE COURT: Does that mean every memorandum that has been introduced here by this witness does not represent any personal knowledge on your part but merely what you have learned from the memorandum? Is that correct?

THE WITNESS: Some of the memoranda I prepared.

THE COURT: Except the memoranda which you prepared, the other memoranda which were prepared by others and found in the credit department, the information contained therein is not based on your personal knowledge but what you learned from the memo?

THE WITNESS: Yes.

THE COURT: Does that clarify it?

MR. BURGESS: Yes, it does. Thank you very much.

THE COURT: Do you ladies and gentlemen understand what we are talking about?

JUROR NO. 2: Yes.

BY MR. BURGESS:

Q Mr. Garvey, you said you met with Mr. Powrie in 1958. Did you ever subsequently meet with him?

A Not to my knowledge.

Q So the only meeting you had with Mr. Powrie was in 1958 and all through the subsequent years that Hess-Goldsmith did business with Textura and Glass Fabrics you never met with Mr. Powrie?

A I also met with Mr. Powrie at his place of business in California, but I don't remember the date.

Q One other time?

A Yes.

Q Did you know Mr. Clark?

A Yes.

Q Who was he?

A He was with our Hess-Goldsmith Division.

Q He was president, was he not?

A Correct.

Q And you wouldn't know, would you, of any

conversations that Mr. Powrie and Mr. Clark might have had?

A Only if I were notified of it afterward.

Q Only if you were notified?

A By file memoranda, if it happened to be summarized and put in the file memoranda. Then I would know about it.

Q The same would be true of conversations between Mr. Powrie and Mr. Colton, isn't that correct?

A Correct.

Q Mr. Garvey, you also testified at length concerning the various attempts to obtain guarantees and various other matters, and you said that -- I believe your testimony is that except for 1965 these guarantees were never given, isn't that correct?

A Subsequent to 1965 we did not receive a guarantee, that's correct.

Q And prior to 1965 you asked and you weren't given guarantees either?

A I don't recall having --

Q You don't recall having asked --

A I don't recall having received any other guarantee than that one.

Q But you still continued to do business with

the only time you are complying with your sworn duty and oath to discuss this case, is when you are regired to the jury room to begin your deliberations, and not one single second before that.

I know there is a temptation to go home: "What have you done today? What kept you so late?"

"Well, we heard this, and John, Tommy, Mary, what do you think?"

You must not do that because you are violating your oath, and you don't want to do that. You will have plenty of time to talk about this case and, to use a vernacular expression, you will have all the time you want to kick it around, and nobody will hurry you to arrive at a faster decision than you care to arrive at.

I want you to follow that instruction.

Another instruction I want to give you is, don't make up your mind about this case until it is concluded. The summation is helpful; the instruction of the court is crucial. Clearly, you can't deliberate without knowing the law, because facts in the case are not suspended, they don't dangle from the ceiling, they are not in a vacuum. Facts all must be related to one another. Otherwise we wouldn't need a judge,

you would find the facts and come up with an answer, and that would be it, though I am not sure that is entirely undesirable, and I am not being facetious. But under our system it is still a matter of finding the facts and applying the law.

What I am saying the long way around is this has been a long case, as I understand, it has taken three to four weeks, and I don't want you to make up your minds until both sides have had an opportunity officially to rest and send the case to you properly for deliberation.

It is my hope and belief that Judge Tenney will be able to resume on Monday, and so I am asking you to come back on Monday at 10:30. I think summations and instructions ought to be done by that day. Should they not? Certainly you don't expect to take more than three-quarters of an hour apiece, do you?

MR. BURGESS: On Monday, your Honor?

THE COURT: Yes, when you are ready to sum up.

MR. BURGESS: I would think about an hour, your Honor.

THE COURT: Does anybody object to an

hour?

MR. TOPKIS: That's fine for us, your Honor.

THE COURT: And I don't think the instructions ought to take very much over an hour and a half. Please don't hold me to that precise minute, because I am not going to hold counsel to the precise minute. I hope they can stay within the hour, and I hope that the instructions will stay within an hour and a half.

So if everything moves along you ought to get this case for your deliberations some time about mid-afternoon, so you can tell your families that you are going to deliberate the case and don't know the precise time at which you will be home. Do you understand.

Is there anything else?

Have a good evening.

(The jury left the courtroom.)

(In open court; jury not present.)

MR. BREINDEL: Your Honor, would you like us here earlier on Monday to go over the charge?

THE COURT: I can't answer that because that presents some problems. I have to see the re-

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mdal 2146

CARLYLE MICHELMAN, Trustee of
Testura, Ltd., in Bankruptcy
Proceedings, et al.

vs.

CHARL-SCHEEBEL FIBER GLASS
CORPORATION, et al.

-and-

VERNES F. GRAFSTROM

New York, November 11, 1974,

Trial resumed.

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(In the robing room.)

THE COURT: I hope I am going to be able to get through. I am not supposed to be here, but I understand you have some more proof to put in.

Incidentally, I read over the transcript for the last session, and I am adopting and approving Judge Edelstein's rulings.

I had not anticipated that he would take any further evidence. I thought he was merely going to adjourn for me, because I had to leave.

That's about it. So far as the charge is concerned, it is all in order now and I can indicate to what, if any, changes I have made, but I think maybe

it can wait until the conclusion of the case.

MR. TOPKIS: We just have a few documents, your Honor.

THE COURT: That's it. See if we can get it all in today. If not, we will try something else.

(In open court; jury present.)

MR. TOPKIS: Your Honor, just a couple of loose ends, and I think we are done.

There has been premarked as Defendants' Exhibit AS for identification four orders accepted by J. P. Stevens on August 10, 1966, from Textura, one for 20,000 yards of fabric, another for 16,500 yards of fabric, and another for 20,000 yards of fabric, and the fourth for 20,000 yards of fabric.

MR. BURGESS: No objection.

THE COURT: Received in evidence.

(Defendants' Exhibit AS was received in evidence.)

MR. TOPKIS: Next, there has been premarked as Defendants' Exhibit BD a letter from Janetschek of J. P. Stevens to Mr. Powrie dated August 23, 1965, and we offer that.

MR. BURGESS: No objection.

"A The difference between 417,000 and 455.

"Q Right.

"A Yes.

"Q Were all these purchases made on a cash basis?

"A No.

"Q You didn't obtain credit at that time?

"A Yes.

"Q From whom did you obtain credit?

"A Both Stevens and Hess."

From page 1383:

"Q Looking at that claim in particular, do you claim that the other defendants had anything to do with Clark-Schwebel's rejection of your claim on that?

"A I don't know. You mean did they cause Clark-Schwebel to reject it?

"Q Yes, sir.

"A I think Clark-Schwebel rejected it on their own."

With that, your Honor, Clark-Schwebel rests.

MR. HARDISON: We have nothing further.

THE COURT: Has everybody rested then?

MR. TOPKIS: Yes.

THE COURT: Very well.

I will excuse the jury.

(Jury excused.)

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THE COURT: I received a memorandum this morning about these charts. I have not seen the charts. I have no idea of what they consist of. I am well aware that charts are used, but they usually are received as exhibits. We have to check to show that the figures are correct and that the charts do not misrepresent or do not unduly stress anything.

Have you shown these charts to the defendants?

MR. BURGESS: Your Honor, we have shown the summaries. I am frank to confess that assuming we are going to sum up tomorrow we still have to check the summaries against the charts.

THE COURT: I am suggesting we sum up today. I will charge the jury, if possible, today.

MR. BURGESS: In that event we would use the summaries.

THE COURT: They are already in evidence?

MR. BURGESS: No. I want to call your attention to the fact that when I began eliciting certain information in this regard from Mr. Powrie your Honor suggested we leave off with that inquiry and prepare summaries. I prepared summaries and gave them to the defendants and they slept on them. And when I closed my case I made reference to the fact that we did have this financial

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to make a motion to dismiss the counterclaim, a directed verdict as to the counterclaim.

THE COURT: I gather that the amount has been stipulated by the parties?

MR. TOPKIS: Yes.

MR. BURGESS: yes.

THE COURT: Because I have not gone into that, as to the amount or how to reach the amount or anything else. The motion is denied.

MR. TOPKIS: Your Honor, there are two other little details, if we may.

First, your Honor, I believe your Honor reserved judgment on the question of Mr. Powrie's claim here being submitted to the jury.

THE COURT: I am submitting it to the jury. That doesn't mean that I think one way or the other on that. I would rather submit to the jury at this time, and I am reserving decisions on any motions that will be repeated at this time. I assume that you are renewing the motions that you made at the close of the plaintiffs' case?

MR. TOPKIS: Right.

THE COURT: I will reserve decision.

MR. TOPKIS: One other thing, your Honor, and that is there is in the case the smallest smidgen of proof

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as to sales of industrial fabrics by the defendants, and here is the way the proof goes, and I don't think it should be submitted to the jury, and I can tell your Honor why in less than a minute.

As to my client Stevens, the proof is that there were two shipments of industrial fabrics made to Glass Fabrics in June of 1960 on contracts made before that date, and you remember we challenged the plaintiffs, "Well, how much of a markup was this by reason of price fixing?"

The plaintiffs responded, "Well, Mr. Travis of Burlington testified there were price fixing increases of 3 to 5 per cent."

Whether there were price increases or not does not prove how much. Mr. Travis didn't join Burlington until June of 1960, when those goods were shipped by Stevens and did not go to any price fixing meetings until later that summer. That being so, we have no proof whatsoever at to any margin of increase as to those Stevens" fabrics.

And, second, the quantity of Stevens' fabrics is laughable. Those two shipments covered $448 of first quality merchandise and $1178 of second. So let's suppose there was a 3 to 5 per cent markup on the first, that would be $15, and on the second, assuming there was price fixing

on seconds, as to which there is no proof, $30 or $40. To submit that issue to the jury, I think, is to introduce the most prejudial material to them.

THE COURT: Well, they have already heard about the matter of industrial price fixing and I expect that they will hear again from you on your summation about how picayune a claim this is. It is already in the case.

MR. TOPKIS: My submission, your Honor, is there is no proof as to it, because as to Stevens there is no proof as to margin, and as to Burlington, the only sales were in '65, two years after the price fixing conspiracy ended, and that is not a matter of dispute. It is a matter of undisputed recorded fact. And on that showing I submit there is no basis for tendering this material to the jury. Of course, I can argue about it, but that will take time and it will be prejudicial.

MR. BURGESS: Your Honor, may I make one brief reply?

First of all, my recollection is that the burden on the defendants to show that once a conspiracy has begun they, in fact, terminated it. So it seems to me that brings the 1965 sales under the umbrella of the price fixing conspiracy, unless they can show to the contrary.

Second of all, I frankly have not reviewed these

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invoices, and Mr. Breindel was supposed to be here this morning, but he had to take his wife to the hospital and I'm frankly not prepared to admit or deny whether these amounts of invoices are correct or whether they are invoices which come within that period.

Thirdly, I think in the absence of any other proof, the evidence of a price increase where there has been evidence acknowledging a conspiracy to fix prices, that that can be used as a proper measure of damages.

THE COURT: For the time I will allow it, because I don't see how any prejudice can arise. It has been discussed before the jury. They have already heard the admissions that there was industrial price fixing, and, certainly, you can point out that they don't amount to much in so far as this case is concerned.

MR. TOPKIS: Very well, your Honor.

THE COURT: I find I have to take a short recess.

(Short recess.)

THE COURT: As to the requests, most requests will be granted directly or in substance. Those requests which I do not feel appropriate will not go to the jury. There is a great deal of factual discussion and I have [illegible] to matters of [illegible]

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cussion of the evidence. I am not going to marshal the evidence in this case.

The following requests of the plaintiffs were not used:

Page 14, which is inapplicable as to price fixing.

Page 15, the charge as to the relations between the conspirators.

On page 23, the charge as to the defendants' business association, I decline to charge.

I decline to charge page 24, the Dommerick conspiracy.

Page 28, the request there regarding the price fixing conspiracy.

On page 39, the loans to Textura I have not covered because in my opinion Mr. Powrie can't recover.

With respect to the damage issue, the amount by which the award is to be discounted may be done by the Court should you wish to furnish me the factors agreeable to counsel.

MR. BURGESS: Could you clarify that for me? I just don't understand.

THE COURT: Well, I don't have it.

MR. BURGESS: No. I understand, your Honor,

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I understand.

THE COURT: I will tell them if they find damages which have to be discounted, whatever figure counsel can agree on, that they should multiply the figure they have reached by that figure. Otherwise, I can do it.

The following requests of the defendants were not used:

13-A, the last sentence.

21, I have let the issue go to the jury, always reserving the right in view of the outstanding motions to dismiss the claim.

I didn't use 21 because it wasn't clear in the context of this case that reference to audited statements, what is proper, as distinguished from audited statements.

On counterclaims, the the request to charge was used with some additions from the defendants' requests.

The damages issue was, I understand, stipulated, was it not?

MR. TOPKIS: Yes.

THE COURT: The punitive damage issue was not concluded because it was my understanding that the defendants were dropping the claim.

MR. TOPKIS: No, your Honor, we are not, I'm sorry, if there has been some understanding.

can get going with the jury.

THE COURT: Right.

(Short recess.)

THE COURT: I am going to eliminate all these various so-called separate conspiracies. As I understand and as we have been talking the last few weeks, it was a conspiracy to put Textura out of business by withdrawing credit and by supplying fabric of lesser quality.

MR. BURGESS: Your Honor, speaking to that point briefly, while that is true, I think that plaintiffs can recover if they show there was a conspiracy to take any action with the natural and probable effect of driving plaintiffs out of business.

THE COURT: The conspiracy is to drive them out of business and the means are these various things. I am willing to list some of the means, but I am not going to list this whole pile of separate conspiracies. I just have to look back to the pretrial order, and on the basis of the pretrial order I should toss the plaintiffs' case out.

Looking at this, monopolies is out, discrimination is out, and I suppose conceivably you might say that they conspired to restrain trade. But, certainly, the pretrial order does not go into this great detail as to all

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(In open court; jury present.)

MR. TOPKIS: If your Honor please, Mr. Foreman, ladies and gentlemen of the jury:

We are very near the end, and I am sure we are as glad of that as you are.

I may perhaps begin by thanking you for the attention you have given us during the e long four weeks. Just a little bit more and you can retire and make up your minds about what really happened here and we can all go home.

I am going to now try on behalf of all three of the defendants, and with particular reference to the only one that I represent, namely, J. P. Stevens, to put it all together for you as we see it, and to ask you to go back to the jury room afterwards and think it over and I hope you will find that the picture that I draw for you is an accurate one.

We have been trying here a lawsuit brought by one man, Mr. Powrie over here, against three companies, corporations, two of them very large, J. P. Stevens and Burlington, and one of them, Clark-Schwebel, a much smaller company, though it is owned in substantial part by [illegible] Company.

I am sure I don't have to tell you down

paid by the building for which I am installing the curtains."

But Mr. Powrie didn't go to a bank. You will remember that his company was always thinly capitalized, it didn't have any money. Bankers have a fully way about them. They don't lend you money unless you can prove you don't need it.

So he couldn't go to a bank to borrow money. He got his money from the defendants. Each defendant regularly permitted him to take a very, very long time to pay the bills. They didn't insist on payment on time. They gave him more and more and more and more.

Without those extraordinary terms, those extraordinary grants of time in which to pay, which each defendant gave him, Mr. Powrie could never have operated.

And who is my witness on that subject? One I will be calling to your attention very often. Mr. Powrie.

As you have noticed all during the trial Mr. Deutsch and his friends have been sitting here taking down everything that has been said. At the end of each day they go upstairs and type it up and the next day we have it. So as a result of their efforts we

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"Q You did get quality adjustments from Burlington and Stevens?

"A From '64 on?

"Q Yes.

"A Yes, sir.

"Q So Clark-Schwebel's policy was unique?

"A Yes. Their whole operation was unique."

That is what Mr. Powrie testified to.

Now, the whole essence of this case was that somebody was doing something together, but this man just said that they were unique. What does unique mean? Alone. That is what Clark-Schwebel was, and that is out of his own mouth. His explanation is, at worse, that Clark-Schwebel was shipping poor merchandise. I have no idea as to that. I will leave that to my good friend, Mr. McGanney, to speak a word about their merchandise if he wants to bother. But this case isn't a case involving whether the merchandise is good or bad; that was the issue that was up before arbitration, and you remember that was settled.

There is another thing. Mr. Powrie always had it within his power if he wanted to leave Clark-Schwebel and go to the other two defendants, or to United Merchants, or somebody else and ask them to weave more

were $36,000, not $150,000; in October they bounced up to $75,000, still only half of the break-even sales.

In November they dropped down to $29,000. And in December the doors were closed. What more reason? Surely, the defendants had nothing to do with thse sales. And these low sales figures, I suggest to you, were what killed Textura.

Now, let's turn, if we may, to the last question to be answered by your, and that is the question of damages.

Your Honor, would it be appropriate at this point to take our luncheon recess?

THE COURT: Are the other defendants going to sum up too?

MR. HARDISON: Briefly.

THE COURT: I think we better conclude our part.

MR. TOPKIS: I would like, if I may, your Honor, about another 25 minutes. Would that be all right? This has been a four-week trial.

We will adjourn until 2 o'clock.

(Luncheon recess.)

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industrial glass fabrics, not decorative.

In fact, that's what started this whole lawsuit. Mr. Powrie saw in the fact that these companies had fixed industrial prices an opportunity to get rich. But they hadn't fixed the prices of the decorative fabrics that were all he bought, and that's why you will not have submitted to you the question of decorative price-fixing, because there was none.

Let me say that Mr. Powrie did buy a tiny, tiny bit of industrial fabrics from these companies. Let me tel you about it. First, in June of 1960 he bought $448 worth of industrial fabrics from J. P. Stevens; $448 worth.

In 1965 he bought $1543 worth of industrial fabrics from Burlington.

There is testimony in the record that the price-fixing conspiracy may by produced increases, price increases, of 3 to 5 per cent. So let's suppose that as a result of the industrial price-fixing conspiracy Mr. Powrie was overcharged 3 to 5 per cent. Well, that means that Stevens overcharged him 3 to 5 per cent of $448. That is at most $21, something like that.

If you sat here for four weeks for $21, I

suspect that you have been wasting your time. But if you want to bring in a verdict for $21, God Bless you, we won't mind.

We feel terrible about that industrial price-fixing. It's long ago been confessed and wiped off the books. The companies have been punished to their shame. I certainly hope we haven't been wasting your time for all these weeks for that.

So, too, of Burlington's 1543. Five per cent of this is what, $60? Is that what we are talking about.

Let's come to money. Do you remember the money my client and the other two companies lost, Stevens $17,000, Burlington $16,000, Clark-Schwebel $38,000?

We are asking for that money in this litigation and we are asking for not only against Textura, which is a bankrupt company, but also against Mr. Powrie and Mr. Grafstrom.

Why are we doing that? We are doing it on the theory that they defrauded us. How did they defraud us?

The judge will tell you that is the essence of a fraud that the frauder, the frauding person, deliberately, knowingly making a false statement, albeit a

material or significant false statement, that it be relied on by the person to whom it is made, and that he suffered from having relied on it.

Let's see. What are the false statements we are talking about here? First, that financial statement of June 30, 1966, that we saw so often in this case. It was filled with misrepresentations. It had that Mo-Vac distributorship valued at $200,000 which was worth zero. Where did Textura get it? From Powrie. What did Powrie pay for it? Zero. What's it on the books at? $200,000.

Then there was the rubber month of June, 1966. I call it a rubber month because it kind of slid into July, and then pulled into June's sales figures the sales that actually took place in July.

I asked Mr. Powrie, you will remember -- No, I think it was Mr. McGanney who said to him, "Of the $128,000 in sales reflected on the June statement, more than 40 per cent were in fact July invoices, is that not correct?

"A Well, the Del Webb job was in there, yes."

So this was a rubber month. And those figures were shown to Stevens and relied on by Stevens.

Here is Mr. Grafstrom describing what happened. He is talking about the July 28th meeting with J. P. Stevens and he is asked:

"Were any financial statements or projections or any financial material discussed at this July 28th meeting with Stevens?

"A To the best of my recollection, Mr. Powrie had with him the actual statements for the-- the audited statements for the first three months of 1966 and the in-house statements either through June or July, I can't remember, of 1966. And he also had wit h him the projection for 1966.

"Q Were these the projections that were drafted by Mr. Friedman?

"A I believe so, yes.

"Q And were these discussed with Mr. Knisel?

"A Yes. They were discussed with Mr. Knisel by Mr. Powrie. And then Mr. Knisel expressed satisfaction with them because the actuals very closely matched the projections."

So there is the false statement as to sales being made on Mr. Knisel. He expresses satisfaction about them. He relies on them to this extent.

On August 10th, as we saw a little while ago, he authorized $60,000 more in orders for Textura. There was a -- well, I will pass the details. There were still other phoninesses on those financial statements, like the $19,000 owing from Mr. Powrie and Mr. Johnstone which they eventually decided forgive themselves.

But the other fraud is the promise of settlement made in the Clark-Schwebel litigation. Powrie promised to pay that $70,000, represented that he could pay it. He knew very well that the other defendants were interested in his ability to pay that. He represented that he could pay it. But the fact is that he knew very well that he couldn't pay it. Who is my witness on that? Mr. Grafstrom. Question to Mr. Grafstrom:

"Q What else was said at that meeting" -- the settlement meeting.

"A Well, there was a lot chitchat back and forth. Don't ask me what all the chitchat was -- a meeting like that there is lots of things said that -- but the end result was that we agreed to those terms, and we agreed to those terms, and we agreed, I think, knowing we couldn't meet them. We had to in order to keep the supplies going, or an effort to."

So what happens? In order keep the supplies going Grafstrom and Powrie lie to Schwebel knowing that that information will be transmitted to the other credit men and knowing that they will rely on it, and they do.

THE COURT: I think I will ask you to bring your remarks to a close.

MR. TOPKIS: I am just about done. Another couple of minutes and I am through.

We asked Mr. Grafstrom whether that was known to be false, and he said, "Yes.

"Q Did you tell Mr. Schwebel and Mr. Nordheim when you made this agreement that you wouldn't be able to perform it?

"A No.

"Q And what's the basis for your statement that you knew these terms couldn't be met? Had you had a discussion with Mr. Powrie about that?

"A Yes.

"Q When was this discussion?

"A Just about before the meeting."

So they discuss it, realize they can't possibly pay, they go into the meeting, they lie, they say they can pay, Stevens and Burlington subsequently

advance them credit on the basis of that representation, and Stevens is out $17,000 and Burlington is out $16,000.

And that's it. If we hadn't been conned, if we hadn't been tricked, we wouldn't be out that $17,000, and the people who conned us and tricked us are Mr. Powrie and his sidekick, Mr. Grafstrom; they made statements that they knew were false in order to keep the goods coming. Those are not my words, they are Mr. Grafstrom's.

Now, I am just about done. You will see on the questionnaire, I believe, that his Honor will give to you a question, "What false statements were made by Textura, Powrie or Grafstrom?" I think you would be warranted in finding the false statements were in the June, 1966 books and in the promise to pay Clark-Schwebel which was transmitted to all defendants.

I ask you on that basis to find that my client suffered damages in the stipulated amount of $17,000-odd, and the other counsel will inform you of their claims.

What it comes down to, ladies and gentlemen, on the main part of the case, this conspiracy, is this: You

will remember four weeks ago when we began I stood before you and said there are all these charges being made all these claims being made. As to that we say, as to each and every one of them we say, "Prove it."

You haven't seen any proof. There is no proof in this record. I have quoted the record to you, over and over and over again. When you search it, when you search your memories of the testimony, when you look at the documents, you will see there is no proof. This man, this company, is not a victim. They lost. That can happen to any of us, but the idea that these defendants conspired, plotted, schemed, to bring about is, I respectfully suggest to you, sheer nonsense.

I want to thank you very much for your attention and assure you that we are as glad as you are that it is coming to an end.

MR. MC CAHEY: Mr. Foreman, ladies and gentlemen of the jury:

I am not going to repeat what Mr. Topkis has said but I do want to say a few things specifically about my client, Clark-Schwebel.

When we started this four weeks ago I told

you that I was going to bring Mr. Schwebel and Mr. Nordheim into court here to explain the situation of the developments with Textura. That became unnecessary because the plaintiffs did my work for me. They brought Mr. Schwebel and Mr. Nordheim and we heard the story of their relationships with Textura from their own lips, so it wasn't necessary for me to call them in our case.

I would just like to remind you, really, of a few of the things we have learned from Mr. Schwebel and Mr. Nordheim and Mr. Powrie.

First of all, I would just like to repeat that Clark-Schwebel is not a giant corporation such as these others. It is a small company, and you heard that Mr. Nordheim really did everything in the decorative department, designed the fabric priced the fabric, he was the one salesman. When there are serious problems that might develop he would call in Mr. Schwebel. But Mr. Nordheim really was the one-man department.

In fact, in this time, in 1960-1966, a representative of Stevens, Mr. Wilson, whose deposition was read, said that Clark-Schwebel wasn't even a factor in the decorative industry. Mr. Vollers testified

to the same effect. So we weren't a big company at all, we were one of Mr. Powrie's three suppliers, but as far as the national market was concerned we weren't a big factor at all.

Another evidence of this is the fact that Clark-Schwebel didn't have any credit department. When an account got into trouble -- most of their accounts didn't get into trouble, Mr. Nordheim said they were A-1 accounts -- but when an account like Textura got into trouble it was Mr. Nordheim and Mr. Schwebel who had to act as the credit department and they had to make the calls and find out how Textura was doing with its other suppliers.

Textura was one of Clark-Schwebel's customers. It wasn't its biggest customer but it wasn't its smallest customer either. I think we heard how Clark-Schwebel did certain favors for Textura, how they gave them a $5000 credit so that Textura could produce its Engineer's Guide, and how Mr. Nordheim went with Mr. Powrie to Pittsburgh and helped Mr. Powrie get a $20,000 grant from Pittsburgh Plate Glass so that they could produce the guide.

There are letters from the record from representatives of Clark-Schwebel writing to contractors recor-

mending Textura.

Another one of these favors that was done the extent was not to enforce Clark-Schwebel's contractual rights. In fact, Mr. Powrie says he had extended credit terms. All that meant was Clark-Schwebel didn't pursue it. When he didn't pay in 30 days they didn't say we are not going to ship you any goods, they let him go along for a while in the hopes he could turn the business around and he would be able to pay within the terms. And also that he would start calling out the goods when they were produced.

There are letters in the record which I will read briefly a paragraph from Exhibit D, which is a letter to Mr. Powrie from Mr. Nordheim:

"You indicated that you felt you would be able to pay" -- this is June 4, 1965 -- "You indicated that you felt you would be able to pay your bills within 90 days. May I suggest that you send us each month one check keeping your account within a 60-day period. Then as soon as you are able to help us we would appreciate if you would bring your account up-to-date."

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Now, there are no letters in evidence of Mr. Powrie replying to that, saying, "Here, Ray, what do you mean by this letter? It doesn't make any sense. I have an agreement to pay my bill in 120 days."

There is no such letter in the file. There is no such letter in evidence here. And the same thing applies with respect to calling out of goods.

Mr. Powrie recognized after some questioning there was no agreement to call these goods out within a year, something like that. There are constant letters that we have introduced, "Dear Mr. Powrie," "Dear Mal, let's get those goods out." No response.

We wrote such a letter in August 1965. By August, 1966 those goods were still sitting in the warehouse. They had not been called out. And so we were doing him this favor. And what was happening all this time? He was taking advantage.

In 1965 his accounts payable grew from $20,000 to $65,000 in a year. He was not calling out the goods. And so what happens all this time? We don't have a personal guarantee, never having demanded one, nor had we charged interest on the account.

At the end of December, 1965, finally Clark-Schwebel writes:

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"Dear Hal: It has been our policy to charge all decorative customers interest the rate of 6 per cent per annuum when they are all overdue more than 60 days.

"We have not done this with you in the past, but we can no longer avoid doing it."

What does Mr. Powrie reply to this letter?

"I have your letter indicating that you want 6 per cent interest on your invoices. You are entitled to run your company on any policy that you establish," is what he says, "but I would think it only fair that this change of policy be applied to invoices following your notification."

Then he says:

"You should that we do not pay interest to our other suppliers and this, of course, will have some effect on placing orders with Clark-Schwebel."

That last statement I just read is directly contrary to what Mr. Powrie testified on the stand, that he did pay interest to his other suppliers.

He was getting unusually favorable credit terms from Clark-Schwebel and he was taking advantage of it, and at the end of 1965 Clark-Schwebel required him to start paying interest.

Then we go through 1965 and Mr. Powrie sends in a couple of checks and reduces the balance somewhat.

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But he is still not calling out these goods. And then we come to the February 24, 1966, letter, which is the letter that I think you saw, which has a red underlining under the words, "I met with our attorney and reviewed the problem with him." And that is the same letter in which Mr. Powrie said he was taking a $30,000 credit on his books. He admitted in questioning that there was nothing in his contract which permitted him to do that. He was just doing that unilaterally, doing it because he thought he was entitled to the credit.

Now, this is the point at which Clark-Schwebel decided to put Textura on a cash basis, to bill it for the goods that had been held in the warehouse for all this time and for the yarn that it had especially purchased. In effect, what Clark-Schwebel was doing at this time was asserting its legal rights. Textura, Mr. Powrie, was saying it was going to its lawyer; Clark-Schwebel went to its lawyer.

THE COURT: I will give you about two minutes more.

MR. McCANNEY: Your Honor, I just then would like to say one thing, just about the quality disputes, as Mr. Topkis suggested I might mention it.

We have had a lot of talk here about Spartan

fabric and whether the the fabric was properly woven in the first place, whether it was properly finished, whether it was properly installed, manufactured, and I suggest that this is not the place that that issue should be decided, that there is a clause, an arbitration clause in the contract and Mr. Powrie was well aware of the arbitration clauses.

I would like to point out in the letter he introduced, May 13, 1964, signed by Malcolm Powrie, he himself drafted such an arbitration clause. It has to do with the Mo-Vac process:

"Q In the event of any dispute between Mo-Vac and me as to the interpretation or performance of this agreement, either party may demand that the dispute be submitted to arbitration."

That is Mr. Powrie's writing. If there is a problem about the quality of the goods it should have been submitted to arbitration long ago. This was Clark-Schwebel's decision, to submit it to the arbitrators, and there is not one shred of evidence that anyone else participated in this decision nor in any subsequent decisions that were taken by Clark-Schwebel.

Again, I thank you for your attention and trust that after deliberating you will come back with a defendants' verdict.

MR. HARDISON: The pressure is on me to be brief. I will try to summarize briefly Textura's claims with respect to my client, Burlington Industries.

I think there are three or four claims that Textura advances here which they say prove that Burlington participated in a conspiracy to drive Textura out of business.

First, there is the matter of the participation in causing Textura to settle its' arbitration dispute with Clark-Schwebel.

I think the interesting point here is that plaintiffs claim that while the arbitration settlement was pending Burlington was assisting Clark-Schwebel in trying to force Textura to settle the matter by holding up shipments of the fabric Crown, and yet the evidence is uncontradicted here -- you may remember plaintiffs showed you a chart, Plaintiffs' Exhibit 829, which is really a chart that I prepared, but to which they stipulated as being accurate -- and it was, and they relied on that as showing that shipments were delayed by Burlington, and they ask you to infer from that that Burlington was participating with Clark-Schwebel in trying to coerce a settlement. And yet this very same chart will show you that during the period of time, March, when the dispute between Clark-

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Schwebel and Textura arose, and the end of July, when that dispute was settled, Burlington shipped more of the Crown fabric to Textura than during any other period in the history of the company, actually, over 50,000 yards.

So why would Burlington try to force Textura to settle its dispute with Clark-Schwebel by [illegible] holding up shipments of Crown, but then wait until the dispute was settled and then holding up shipments of Crown. It just doesn't make any sense.

I believe the plaintiffs recognize that fact now, because they say, "Well, you, the jury should then infer that these parties were in a conspiracy because of two facts, No. 1, the Clark-Schwebel matter was settled at the St. Regis Hotel on July 29, 1966, [illegible], No. 2, in August and September there were zero shipments of Crown to Textura.

Well, I submit that there is nothing unusual about zero shipments of a fabric to Textura in any given month. On the same chart, on page 2, we tabulated the shipments of another important fabric to Textura, namely, Satin Boucle.

If you look at that you will see in the year 1965 alone there were 1, 2, 3, 4, 5 months when there were zero shipments of Satin Boucle, and zero shipments are

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not at all unusual with respect to Crown in 1964. This was a period of time when no claim of conspiracy is being made.

In May of 1964 there were only 111 yards of Crown shipped. And in June of 1964 there was zero yards of Crown shipped to Textura.

I suggest to you that the reasons there were zero shipments of Crown in August and September is because of Textura's not calling out any fabrics in those months. Mr. Powrie himself made a very big point with you, that in August and September he didn't have any money. He made a very big point of the fact that Dommerich had all of his cash reserves in August and September and he didn't have any money to buy fabrics with.

I also suggest to you that there is very strong implication in the record that in those months Textura didn't need any fabrics because what with their inventories in August and September and October, their inventories of fabrics were large and they were increasing.

At the end of July their own financial statements show that their inventories of fabric were $171,848. At the end of August it went to $175,808, and at the end of September the fabric inventory had increased another $10,000 approximately, $184,945. That is probably a

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couple of hundred thousand yards of fabric. And it went up still more in October, because Plaintiffs' Exhibit 46 shows at the end of October Textura had a fabric inventory in the amount of $186,650.

Textura also makes a point with respect to my client relating to the matter of our requests for personal guarantees from Mr. Powrie. You may remember that Mr. Powrie during his direct examination early in the trial first tried to give you the impression that the first request for a personal guarantee he received from Burlington was in May of 1966, just after he had received a request for a personal guarantee from Clark-Schwebel. So he was advancing this as a coincidence of timing from which, the jury, should infer some unlawful purpose on the part of Burlington. But the record is perfectly clear, and Mr. Powrie later admitted himself on cross-examination, that throughout the history of Glass Fabrics and Textura, Burlington's credit department was constantly seeking a personal guarantee in connection with the payment of Textura's accounts at Burlington.

It is true that he got one in 1965 following the terrific losses at the end of 1964. But immediately in 1966, the evidence shows, you may remember, the memorandum that Mr. Garvey identified and read from, on January 5,

1966, the Burlington credit department immediately renewed the request for a personal guarantee. They followed up on that in March of 1966 and again in April at a meeting in New York City between Mr. Schutz and Mr. Powrie. And at that meeting, by the way, Mr. Powrie agreed with Mr. Schutz that he would give his personal guarantee for the year 1966. That was based in part on the fact that 1965, just like 1964, had been another loss here.

Textura had a loss of 30,000, as you have heard several times, at the end of 1965. But then Mr. Powrie went back to the West Coast and he later refused to give the guarantee, although he has promised Mr. Schutz he would renew it. And you may remember that that led to the memorandum that Mr. Schutz wrote on June 8, 1966, where he stated that he had only known Mr. Powrie for about a year, that he always thought him to be a man of his word, and he was frankly quite surprised that Mr. Powrie would renege on the agreement to give the personal guarantee. But that still didn't mean that Burlington was going to eliminate credit in 1966, and, in fact, we did not eliminate credit in 1966.

Mr. Powrie has specifically recognized that. He said that he did receive credit from Burlington throughout 1966.

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So I submit to you, ladies and gentlemen, that there was no abrupt change with respect to the personal guarantee matter on the part of Burlington in 1966, contrary to the impression that Mr. Powrie tried to leave with you.

Now, finally, there was a claim by Mr. Powrie that he had a meeting with Mr. Schutz, I believe it was, on July 27, 1966, just a couple of days before Mr. Powrie the meeting at the St. Regis Hotel with the Clark-Schwebel people, where the Clark-Schwebel arbitration was finally settled by agreement.

Mr. Powrie said that at that meeting with Mr. Schutz, Mr. Schutz knew that he was going over to meet with the Clark-Schwebel people and Mr. Schutz said to Mr. Powrie, in effect, "Settle the arbitration dispute with Clark-Schwebel or Burlington won't be able to give you an open line of credit."

I think it is important to note just exactly what Mr. Powrie claims that Mr. Schutz said. He said that as long as the Clark-Schwebel arbitration matter was hanging over this situation, Burlington was not going to give an open line of credit. That didn't mean we would not give him credit; it certainly didn't mean that we would not sell him fabrics. We clearly would. It merely meant assuming the statement were made, that he would not

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have an unlimited line of credit as he had had in the past. There was going to be a ceiling put on it in some fashion.

By the way, it is interesting that Mr. Powrie himself testified that he knew the arbitration matter as it concerned Burlington would be of concern to any credit man, and he knew it would affect Textura's credit standing. He was perfectly right. It seems perfectly normal for a credit man to view the matter of pending arbitration in the amount of $92,000 with some concern wher he is considering extending his exposure as far as that company is concerned.

So I say to you, even if Mr. Schyx did not make that statement, it was fully consistent with the best interest of the Burlington credit department to be concerned with the arbitration matter, it was of interest for the Burlington credit department to have that cloud removed before increasing Burlington's credit exposure, which, by the way, at that point stood at about $30,000.

So I ask you, is that any proof of conspiracy? I think not.

Finally, I want to make a brief reference to the matter of the so-called complaints from Textura's customers that the plaintiffs rely on here so much to prove the

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motive on the part of Burlington to drive Textura out of business. I'm quite sure you are going to hear a lot about this in just a few minutes from Mr. Burgess.

I want to tell you what the evidence really is on that score.

You heard Mr. Vollers testify last week. He was formerly in charge of the Hess-Goldsmith Division of Burlington Industries. That was the division that sold fabrics to Textura. He said he received such complaints from some of his customers, including a company called Qual-Fab throughout the Textura history, not just in 1966, and these complaints didn't increase in frequency in 1966. He said he never took any action against Textura on the basis of any such complaints, which he viewed, by the way, really as minor matters and more in the nature of a gripe, than a serious complaint.

The complaints, by the way, related principally to the fact that Textura purchased its fabrics in the greige state, that is, they were not finished, and they were finished by Textura out on the West Coast, as you have heard, and, apparently, some of Burlington's other customers didn't purchase on that basis and felt that this somehow gave Textura some advantage in the market.

But Mr. Vollers testified all he had to do to

placate such customers when he got such a grip was simply to explain to them the way Burlington did business with Textura, and that was all there was to it.

I think it is important to remember that Mr. Vollers testified he never discussed those complaints with anybody outside the company. So how could there be any agreement between Burlington and any of the other defendants to take any action against Textura based on those complaints when there was no discussion of those complaints among the defendants. In fact, Mr. Vollers said that he never discussed those complaints with the credit department of Burlington. So any actions that the Burlington credit department took could not have been based on any complaints of that nature received by Mr. Vollers.

I think to try to sum up here, Textura's real complaint, if one exists as far as Burlington is concerned, is in the area of the alleged restrictions of credit in 1966. As indicated a moment ago, there is no contention that we eliminated that credit. What Mr. Powrie seems to be saying is that he had very favorable terms before, and then in 1966 the Burlington credit department asked for his personal guarantee and also tried to get him to pay his bills promptly, within 60 days, and the previous terms that Mr. Powrie seem to be relying on, dating back

to 1958, when he claims he had a meeting in New York, apparently in September, with various people in the sales department, Mr. Goldsmith, Mr. Colton and Mr. Clark, where Mr. Powrie testified, you may recall, that at that meeting Mr. Clark agreed orally to extend Glass Fabrics, as it was known then, credit to a four-month term, you will remember that Mr. Powrie said that Mr. Clark said, "This understanding can't be reduced to writing and we can't put it on the invoices. The invoices will have to bear the normal terms, because some of our customers may find out about it and want the same treatment." And so it was a secret agreement that he had orally with Mr. Clark.

The agreement, by the way, also was kept secret from the credit department, because it is perfectly clear that the credit department, which had the final say as to whether goods were to be delivered, never had any information, had never been told by Mr. Powrie or anybody else that there was an agreement with Mr. Clark extending Glass Fabrics' term to four months.

The existence of any such agreement, also, is flatly contradicted by the cold record that we put in evidence before you last Thursday through Mr. Garvey. You remember he testified before September, 1958, Glass Fabrics had been on a cash basis, and Glass Fabrics

remained on a glass basis after the September, 1958 meeting, because they were not able to work out any kind of credit arrangement for one reason basically, Mr. Fourie at that time was not willing to give his personal guarantee, and he also was not willing to put up a cash deposit to insure completion of the contracts, which were conditions that Mr. Colton of the Burlington sales department required.

The record also shows we went into this with Mr. Garvey, who referred to the Burlington ledger sheets, which, it has been stipulated, reflected the terms and the conditions of payment and the amounts of time lapsing between the invoice and the payment, and those ledger sheets clearly indicated that Glass Fabrics remained on a cash basis during the first quarter of 1959. Then in about mid-1959, after Glass Fabrics had supplied a balance sheet and financial statement at the end of the year, regular terms were extended. And those regular terms were net 30 days.

You remember that Mr. Garvey traced the payments through 1959 and much of 1960, and he showed, he demonstrated that Textura was paying its bills.

Glass Fabrics was the name of the company at that time. Glass Fabrics was paying its bills roughly within 30 days.

Now, it is true that in 1962 and 1963 payments closed up considerably and the balances that Glass Fabrics owed to Burlington began to increase. For example, in 1963 they were as high as $36,000, in July. That is the balance owed. And the payments were slowing up, too, as I indicated, they were running from 60 to 90 days and more. But then in 1964 the Burlington credit department again asked Mr. Powrie for his personal guarantee because of those facts, the fact that the balances were high and payments were slow. But Mr. Powrie refused.

What happened? In August of 1964 -- and the ledger sheets, Defendants' BT and Plaintiffs' Exhibit 806 clearly indicate that -- in August of 1964 when Mr. Powrie refused to give a personal guarantee, the Burlington credit department put him on a cash basis. That didn't mean we eliminated credit; that merely meant if he wanted a thousand dollars worth of goods on a new invoice he had to send us a thousand dollars.

THE COURT: I am going to have to ask you to bring this to a close.

MR. HARDISON: I am almost through.

My point is, he was placed on a cash basis in 1964. In 1965 after those big losses in 1964 we asked for his personal guarantee, and he gave it to us. We

tried to renew the guarantee in 1966 and he refused. He had first agreed to give it to us, and later on he refused. But notwithstanding that refusal we continued to grant him credit and weave fabrics, including Crown and Satin Boucle.

You heard Mr. Garvey testify that new contracts for Satin Boucle and Crown were entered into in November of 1966, just a few days before the assignment for the benefit of creditors. And, in fact, when that assignment was made and when Textura closed its doors, Burlington had an inventory of 82,000 yards of fabric woven specifically for Textura's account, including 9000 yards of Crown and almost 5000 yards of Satin Boucle, fabrics which Mr. Powrie just didn't call out.

Thank you very much.

MR. BURGESS: Your Honor, I wonder if we can have a short recess?

THE COURT: yes.

(Short recess.)

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(Recess.)

(Discussion off the record in the robing room.)

(In open court. Jury present.)

MR. BURGESS: Ladies and Gentlemen of the Jury: ow has come the time for the plaintiffs to sum up their ase. We have heard at great length from defendants in his action, some two hours and t en minutes' worth, and hope I am not going to keep you quite as long, but I sk your patience. It has been a long trial. We have tried o present things as succinctly as we could. They went a ittle faster than we thought, and we are going to get out arly , hopefully.

I want, before I get into our claim,basically to ust dispose of this matter that Mr. Topkis brought up at e end of his summation, which is the counterclaim inter- osed by the defendants in this case.

I believe I told you when we opened this case that his counterclaim was, we felt, a frivolous matter that as interposed simply as a basis for vilifying Mr. Powrie nd for attacking his character.

I want to mention three points. Mr. Topkis pparently relied on two things that Mr. Powrie, he said, isrepresented to the defendants. He said that he made isrepresentations in the June 30, 1966 statement; and he

said that those misrepresentations were that the statement had kept the books open longer than they should have; that it included the Mo-Vac process which was subsequently found to be worthless; and that it included a job, the Del Webb job, which Mr. Powrie subsequently found out was not a sale in that month.

His Honor will charge you ladies and gentlemen of the jury that in order for the defendants to recover on their counterclaim they are going to have to show that they relied on these statements. There is absolutely no evidence that any one of the defendants relied on the statements. In fact, Mr. Knisel suggested just the contrary. He suggested that he didn't rely on the statements of Mr. Powrie. So that's out.

Mr. Garvey suggested the same thing in his testimony, which was the only witness that Burlington produced.

The second thing is that Mr. Topkis said-- let's take the matter of the Del Webb job. Mr. Topkis said he was going to produce someone who would give the lie to Mr. Powrie on the Del Webb job. You heard Mr. Powrie say that on the day that Mr. Danielson -- who was the guy who subsequently told him in August that the Del Webb job was no good, that he was not going to -- Del Webb wasn't going

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accept the contract that Mr. Powrie thought he had back in July -- you heard Mr. Powrie say that on the day which Danielson said -- he called him and told him the deal is off -- Mr. Powrie was in San Francisco.

You didn't see Mr. Danielson called, did you? The person that Mr. Topkis said he was going to call he never produced.

So that I think on all the facts, ladies and gentlemen, on this counterclaim there is no counterclaim in this case. There was no reliance by any of the defendants, and they have testified to that. There was no intent to deceive on the part of Mr. Powrie. This matter was footnoted in the statements so any of the defendants, the sophisticated credit men, would have been given reasonable grounds to pursue the matter further, but the fact of the matter is they didn't.

The second fact I want to call your attention to is all of them had outstanding balances of a greater degree on that date than they did subsequently. There is no proof in their subsequent extensions of credit they relied on anything Mr. Powrie stated.

As far as Mr. Grafstrom, he said he didn't participate in or authorize their preparation, so he is completely out of this case.

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They have also said, ladies and gentlemen, that Clark-Schwebel wouldn't have settled this matter, they would have pursued the matter to arbitration, if Mr. Powrie had told them that he couldn't perform the Clark-Schwebel settlement.

You and I very well know, we heard Mr. Grafstrom testify, that they were notified that it would be extremely difficult for Textura to perform this settlement.

Besides that, ladies and gentlemen, they had Textura on a cash basis. They didn't suffer any damages, and I am sure his Honor will instruct you on this matter, but I can't help saying that you can't find damages on what might have happened if Clark-Schwebel had pursued the matter to arbitration.

So that takes care of these counterclaims. They simply aren't in this case. There is no basis for finding that Mr. Powrie or Mr. Grafstrom made any misrepresentations to the defendants on which they relied.

I want to make a couple of other points just at the beginning here to just clear up a couple of things that Mr. Topkis said.

The plaintiff in this case, one of them, is Mr. Powrie, that's true. The other one is Textura, a bankrupt corporation which is suing to recover for the estate of the

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bankrupt, for its creditors and its stockholders, one of whom was Mr. Powrie, and the other of whom was Mr. Grafstrom. But these are the plaintiffs, a bankrupt corporation and Mr. Powrie.

Second of all, what we are alleging here is conspiracy, something that took place in secret. So all this chapter and verse that Mr. Topkis cited to you about how Mr. Powrie didn't know that the defendants were participating in this decision, and he didn't have any information of this, and he didn't have any information of that, well, he wouldn't have. It was a conspiracy. They didn't call him in and say, "Look, we are conspiring to put you out of business." That isn't the way they operate.

The third thing is Mr. Topkis seems to suggest that in order for us to prove a conspiracy we have to prove that all of a sudden on a certain day at high noon they all shut down the credit, they all shut down the fabric, everything is stopped, and Textura dies.

Well, big corporations don't act that way; they just don't. Not only that, these defendants in this case had been prosecuted for a price fixing conspiracy, for behaving in that way, for taking uniform action with respect to prices. They knew what the consequences of that was. They were not going to get caught twice. They are not going

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to take action like this. They know the consequences of that action.

Now, ladies and gentlemen of the jury, as I outline the evidence here for you I want you to realize that the remarks of Mr. Topkis and myself are not evidence in this case. The evidence is what you have heard on the witness stand from the people here.

The question is: who are you going to believe? Are you going to believe the defendants, the price fixers, or are you going to believe Mr. Powrie, a man who invested his life and his time into a company? And are you going to believe people who say they engaged in routine credit exchanges of information but who we are going to show you were suggesting all along to each other to take action, and who took action on the basis of each others' suggestions?

Everything I say to you this afternoon, with that precaution that it is not evidence, is either based on record evidence, on documents, some of which I will mention to you, any of which I won't because I've got to answer two hours of summation here with what I hope is going to be a lot less to get us out of here in a reasonable time, or it is going to be inferences that I suggest you can make from the evidence, because our case is based on inference.

A conspiracy case is based on inference. We don't have a written agreement. If we had a written agreement that these guys were going to put us out of business we wouldn't have been here.

Now, the principal part of our case, and the principal part for which we claim substantial damages, is that relating to the conspiracy among the defendants Stevens, Burlington and Clark-Schwebel, instigated by Clark-Schwebel, which the natural problem and effect of this conspiracy was to drive plaintiffs out of business.

This was a conspiracy that restrained competition among these three corporations to the injury of Textura and Mr. Powrie. In other words, what we are showing you is that instead of competing, as is proper and legal under our system of government, the defendants got together and cooperated. They had a tacit understanding. They followed each other's lead in matters pertaining to Textura. As I said before, conspiracy wasn't new to them.

Let me dispose of another issue right away. All the witnesses we produced were hostile witnesses. And you know what a hostile witness is. He is a guy who works for the other side that you are trying to get the truth out of, so these aren't friendly witnesses,

these are guys we are trying to get the truth out of.

Mr. Topkis asked these people on cross examination: "Did you intend to drive the plaintiffs out of business? And they answered to a man, as if by rote and rehearsal: "We didn't intend to drive plaintiffs out of business, we didn't want to drive plaintiffs out of business, we lost money because they went out of business and it wasn't in our interest to drive them out of business."

I want you first of all to realize that whether these individual men had bad feelings or good feelings toward Textura is not really a consideration in this case, because the defendants here are corporations and they act the way corporations act. They don't act like you and I. We get an idea, we get out of bed, we go do something. These policies take time to develop. One person gets some information here, the other person gets some information here. It is a corporate act. They all get together, slowly something congeals; a direction, a policy takes shape. This is how this conspiracy took place -- could have taken place, happened.

If the natural effect of the actions that these men took put Textura out of business they are as

liable as if they sat down and said, "I hate him, I want him out of business."

Because, ladies and gentlemen, you have got to have credit terms on which to operate, you have got to have fabric on which to operate, and if these defendants got together and tightened those credit terms, restricted credit terms, that had previously existed which were longer, if they got together and shut down the fabric by however means they did it, however means they did it, if they did it pursuant to an understanding, following each other's lead, they are as liable as if they maliciously intended to do it.

Why would the defendant corporations want to put Textura out of business? I believe that is a question Mr. Topkis raised and I believe Mr. Hardison raised it. It is an interesting question and it requires some attention. We are going to tell you why because we showed right here why.

The textile business was an ancient business, but weaving these diminutive glass rods into fabrics was a new business. Glass Fabrics was one of the first companies to market fiber glass, and it was marketing its product in an ancient business, an ancient business which, as you have heard testified to

by Mr. Gottschalk, whose deposition was read, by Mr. Vollers, Mr. Erskine also contributed to this, his deposition was read -- and Mr. Powrie testified at length to it -- that there was a traditional mode of distribution in this business, and that mode of distribution was the following:

Owens-Corning sold the fibers, the defendant weavers, these defendants, wove them into fabric. They sold them to what they call true converters. And the true converters sold to jobbers. And you have heard that word. And the jobbers to decorators, who then would sell them to the ultimate user, you or me. Or, in the alternative, maybe the mills would sell the fabric to manufacturers who sold them to department stores. But that is not relevant in this case. We are talking about the level of distribution which goes through the converter to the jobber, to the decorator.

Now, Mr. Powrie came into this business with a new product, and he sold it differently. The old way required four or five people to get a cut before you and I could buy the fabric. But Mr. Powrie came into this business, and as he told you he sold his fabric differently. He skipped the jobber and he

skipped the decorator, and he sold it direct to office buildings.

Now, I ask you: is an office building, a guy who wants to put fabric in an entire office building, an architect or an engineer, is he going to go down to Woolworth's and buy draperies?

No, he wants to buy it from a guy who can furnish it top to bottom, the whole building, and Mr. Powrie's business was the first to do this.

But what did that mean? It meant that he skipped the two or three hands who took the profit along the way. He skipped over these guys, and they were sore, they were sore. There was an outcry right away. There was an outcry from Owens-Corning, there was an outcry from other people. There was an outcry from his competitors. They complained to the mills.

By the way, this is what Mr. Vollers said. This is not an idea Mr. Powrie dreamed up. Mr. Vollers testified, and Mr. Hardison dwelled on this a while. He testified Mr. Powrie could undercut the true converter customers of Burlington. The true converters who sold to the jobber, who then sold to the decorator.

This hit the defendants where they lived, in the pocketbook. Vollers also testified because of this it was difficult for everybody to make a profit; just what we have been saying all along. It was difficult for the defendant mills' customers, and hence the defendant mills, to make a profit.

How about this Mr. Vollers? When we first called him to the stand he said he received only several complaints, trying to brush them off, a minor matter. But we checked back into his deposition, we read and we found out he said the complaints wer so numerous if he stored them in his head he would have room for nothing else. That's how numerous they were.

And who was complaining? The peanut gallery? No. Qual-Fab was complaining, a customer of Burlington's that Mr. Vollers said they did $3 million a year with. That's 10 times as much as Textura, who was a 200 or at most maybe a 300 hundred thousand dollar a year account. I think you will find in the interrogatory answers, which we have submitted in evidence, that their purchases were less than $200,000 per year.

So somebody that did 10, 15 times more busi-

ness with Burlington that Texture did was complaining about their selling methods.

Thortel, Ben Rose, two other people who complained. Also customers of Burlington.

Now, Stevens got these complaints too. At least Mr. Petersdorf alluded to the fact that they got some complaints.

And Mr. Wilson, when Mr. Bernie finally had gone out of business, when he said he wasn't going to sell him any of the fabric, ultimately said, "I am going to get Howard & Company to distribute in the proper manner." Just what we have been saying all along, ladies and gentlemen, the traditional distribution pattern.

And you heard Mr. Knisel say that Dual-Fab and Thortel were also customers of Stevens.

I am going to ask you, ladies and gentlemen, is it logical to believe that Dual-Fab and Thortel made so many complaints to Burlington that Mr. Vollers couldn't keep them in his head and they didn't complain to Stevens at all?

I would like to point, ladies and gentlemen,

or Mr. Schutz got on the phone with Mr. Janetschek or Schzebel and Janetschek got together, we can't produce a memo every time this happened. In fact, Mr. Garvey testified under my cross examination that there were times that these people -- he said he should have a memo for every time he communicated with somebody from the other side, but, frankly, no memoranda relating to communications between him and Kniesel, which he testified to, were ever produced in this case. So they may have talked to each other extra these memoranda we have seen, outside these memoranda we have seen. But I think the inference is if both of them were complaining, these people were in close, they were in tight, they must have talked to each other about it.

You might say, okay, Textura was making waves, causing complaints; why didn't the rills do something right away? Well, they didn't do something right away because, as this map which I will hold up to you shows, when Textura started out its business it was just on the West Coast, and the defendants were on the East Coast, and as long as Textura stayed out here and Quol-Tab and Shertel and the principal [illegible] were [illegible] on the East Coast, they didn't

worry as long as Textura was out here. But when Textura began to expand into the East Coast, when it began to spread its offices out in 1964 and 1965, that is when, as you recall, Mr. Powrie testified -- that is when the complaints really began to hit the fan, so to speak.

But what happened then? At that time he met with Mr. Colton in New York City. And what did Mr. Colton say to Mr. Powrie? He said, "If I had to do it over again I would never sell to you. If I could find a way to get rid of you as a customer I would."

Why? Because Qual-Pak, Thortel and Ben Rose were complaining, and this coincided with the time Mr. Powrie moved his office, when Textura began expanding its offices to New York. So this is when, ladies and gentlemen, these defendants really began to feel the pain of these complaints, when Textura began to go national and really put the bug under Qual-Pak and the rest of these people.

What did Colton do -- rather, what did Vollers do when he received all these complaints? He spoke to Mr. Colton saying Mr. Colton had told Mr. Powrie, "If I had to do it all over again I would never do business with you. If I could find a way not

to do business with you I'd do it because of the complaints of Qual-Fab and Thortel."

Mr. Vollers took it up with Mr. Colton, and Mr. Colton said to Vollers, "Do something about Textura."

The meaning is crystal clear: When you have an opportunity see if we can get rid of them.

I urge you not to believe Mr. Vollers' denial they didn't take action against Textura, that he just simply pacified these people.

His testimony from the stand was false as to the number of complaints he received. He said he received several when in fact he received so many he couldn't keep them in his head.

When I asked him under cross examination, I asked him, he was the guy who shut off Textura's weaving according to Mr. Powrie -- you heard Mr. Powrie testify to that, and you saw the defendants' documents, and documents which clearly established that there was a point when the weaving of Crown was stopped. And if you remember this, there is one of defendants' own documents which says, I believe, "We will start weaving Crown again," something like that. "We are starting to weave Crown again.

When I asked him under cross examination, he said he didn't really, really shut them off.

You and I know what that means. It means just as stated in this exhibit, that in July and August their deliveries of Crown went from 11,000 the previous month to zero in August and September. And, of course, when you shut down the weaving in the prior months it shows up in deliveries in the subsequent months.

So Mr. Hardison's point that they got deliveries in June and July is completely meaningless. The effect of the shutting down of weaving took place in August and September.

The fact of the matter is that Mr. Vollers did stop the weaving. He did stop the weaving, and he was false in suggesting -- he was lying when he suggested he didn't stop it. So, ladies and gentlemen, I urge you not to believe him, and I urge you to believe that in fact they did take action against Textura, and that he simply looked for the opportunity to take action.

Why would he put a customer out of business? To stop a maverick customer from louising up the marketing of their goods through this traditional pattern.

Did they stand to lose anything? Would you pay $17,000, which I guess was owed to Burlington by Textura when all the dust settled, would you pay $17,000 to save a $3 million account? You bet you would.

Besides, ladies and gentlemen, they had an ace up their sleeves. They wouldn't even lose the sales represented by Textura's purchases. They had a built-in replacement, Softflex Fabrics. This was the organization that Erskine, who was the sales agent for Burlington, Gumbiner, who was the finisher of Menardi, and Cann, who was one of Evans-Corning's men, got together because they wanted to explore a market to distribute goods in the traditional fashion, an organization to go back to distributing through jobbers, and this is documented chapter and verse. Mr. Gumbiner said so, Mr. Erskine said so, there is a memo of Mr. Cann's which uses these phrases, uses this language.

These were the people who were ready to and did in fact step into the shoes of Textura one month after it went out of business. These are the people that Wilson said he was going to sell to to distribute in the proper manner.

In other words, they had another company

ready to take over the weaves, and you know very well, and it is in the record and it's been testified to, that each of the defendants in this case sold Textura's former styles to this new company, Softflex Fabrics, so they didn't stand really to lose that much.

In terms of their account, in terms of the Textura account, in terms of an outlet for their fabrics, in fact they they had a better deal, they had an outlet for their fabrics ready to take over the business who was going to distribute it the way they wanted it, and who wasn't a headache, you know, who didn't gripe, who didn't upset the boat.

They had another reason. We are still talking about motive, why they put this company out of business. They had another reason. The defendants wove bad goods, and they knew it. They just did. You have heard Mr. Erskine's memoranda which I have introduced. "The quality is terrible," he says in his memoranda. Mr. Nordheim admitted to Mr. Powrie that the quality was terrible. Mr. Powrie -- you saw Mr. Powrie tear a piece of Clark-Schwebel fabric that was finished by them and woven by them in two. This was bad fabric, and they knew it was bad fabric.

But Textura, and Mr. Powrie, had the guts

to complain about this fabric, and to stand up for its rights, and not to eat the fabric, like the defendants wanted them to. And like the provisions on the back of their contracts, that fine print, which I held up to you, that fine print said: if you do anything with these fabrics, if you breathe on these fabrics, you touch them in any way, even a latent defect you can't recover for.

Mr. Powrie stood up on his hind legs and said, "I'm not going to eat these fabrics." He was willing to live with the 5 per cent working loss, but not a 50 per cent, as Mr. Alonzo said was working out with Crown in 1966. He wasn't willing to swallow this. He wasn't willing to swallow the bad quality from Clark-Schwebel.

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In fact, he made more complaints. He made more complaints than Clark-Schwebel's other customers. What happened? Clark-Schwebel got sore, and he testified under my examination he was unhappy. He was sore. And who received the complaints on behalf of Burlington about the bad quality? Vollers, the same Vollers who heard the other complaints from the competitors about not liking Textura because it was cutting them out.

have it woven together.

There are these complaints about the bad quality, and the defendants are getting gripes from their customers about how Textura can undercut them in the market, and they stand to lose a little dough on either account.

So now we have another [illegible], because it would not shut up. Why? Because if Textura were not shut up then maybe the rest of their customers would start griping and some of that fine print might be threatened, you know, they might not be able to stand by all that fine print.

I want you to get the picture of who the defend-

[illegible] a bunch of their separate entities,

[illegible] These people were

[illegible] They had been organized in an

of non-competition, a history of cooperation, in fact, with each other.

And Mr. Schwebel? Who is he? Before he went to Clark-Schwebel he was a high officer of the defendant Stevens.

Mr. Clark, who was the other organizer and founder of Clark-Schwebel, was a higher-up of a division of Burlington. So these people were not like one over here and another there; they were like this (indicating). There was personal interchange. They all knew each other. They were close to each other. When someone called Schwebel, he knew he was talking to a former officer of Stevens. And so it was the same with Clark. I suggest to you they owed each other something. They were fellow price fixers. They were the instigators of a conspiracy to fix prices on industrial fabric, and when they left, they set up their own company. But they still talked to each other, worked with each other, and you all know the expression "honor among thieves". These people were more used to conspiracy and cooperation than they were to competition. [illegible] to help them if had a personal job call [illegible] and Burlington at once, I submit to you [illegible]

one conspiring party to do a favor for the other, to help out their friend, to do a favor for Clark-Schwebel. And they went right along.

Ladies and gentlemen, I think that establishes pretty clearly that there was a strong motive among the defendants in this case to act for each other's benefit and to act to punish, discipline and drive Textura out of business.

Why were these three defendants important to Textura?

Ladies and gentlemen, the most important factor you can remember in this case as far as I am concerned is that the defendants had enormous power in this industry, enormous power over our client Textura and Mr. Powrie.

As Mr. Garvey, the only witness which the defendants produced, testified, Burlington is a company which does 2.1 billion dollars worth of business annually.

Stevens and Clark-Schwebel by virtue of its affiliation with the Lowenstein Company, which was testified to, are substantial companies, believe you me.

Mr. Vollers, another former officer of Burlington, testified that the defendants, the three defendants whom you see represented at this counsel table, were the only major producers of decorative fiber glass fabric in this

country. That is it. There was nobody else.

You heard Mr. Powrie testify that in 1965 and 1966 there were no other sources for this type of fiber glass marketed by him.

Furthermore, ladies and gentlemen, you will recall that Mr. Powrie also testified that in connection with the defendants, who he called his partners, he called his partners because he was joined with them in trying to get this new enterprise, this new method of marketing off the ground, he testified that in connection with them he developed these individual styles of fiber glass fabrics which he then had tested by his own facilities for their sun control properties, and that he would market these by going up to the architect or the engineer of a company and have that architect or engineer specify those fabrics for the building so that he would have that fabric committed to a building a year, a year and a half in advace.

What I am trying to get across to you, gentlemen, is that these were styles of fabric which Mr. Powrie developed with the defendants, which he then had sun-controlled tested down in his laboratory in Arizona, which he put in a sample book, which he advertised and invested in and got up that information in the Engineers Guide, which I offered in evidence. I think it was the very first

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document I offered.

These fabrics were not simply something that if you ran out of one you went down to the store and bought another one. They were confined styles. They were confined styles. They were confined styles, and if one defendant didn't weave it for him, he could not get it from another one, and if two or more of the defendants decided they were not going to weave these fiber glass fabrics for him and were going to shut down his deliveries, he was effectively out of business, because he was totally dependent on these three people for the kind of fabrics he marketed in the unique business he was in and for the sale of this fabric in direct contract or in subcontracts in the building trade business.

There was another reason that Textura was dependent on the defendants in this case, and this has to do with what had been described at length in the testimony as the extended credit terms agreement.

How did this come about? You heard Mr. Powrie testify to it, and I am not going to go over it at great length. Mr. Powrie took over the company in 1958. He saw right away that he needed special conditions, indeed, special financing conditions from the defendants in order to get his company off the ground. And he made an oral

agreement with them to accept contracts for large quantities of woven goods, to be held by the defendants, each of them, ship to Textura when Textura needed the goods. Textura would be billed for the goods when Textura called them out, and that these billings would be paid in approximately 90 to 120 days.

Now, we have made no bones about it that these extended terms were oral. They were in contradiction to the payment terms printed on the billing invoices, which were generally 60 or 30-day terms.

The defendants sought to make an issue of this. We claim that there was this oral understanding and we feel that we have proved that because of what happened over the years, that that is how Mr. Powrie paid his bills, and I don't think the defendants seriously contest it. Sure, at one time or another these credit terms might have been tried to be cut down a little bit by Burlington, the credit men trying to get after him, maybe to get him to cut down on the terms. But there is no doubt, ladies and gentlemen, that these terms existed.

Mr. Schutz, the eminent Mr. Schutz, who Mr. Hardison introduced a memorandum from, he admitted, or, at least he didn't deny when Powrie brought it up in the memorandum that a 120-day term existed, existed in 1965.

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You remember when Mr. Powrie said to him in this memo that his payments in 1966 were an improvement over the 120 days. And Nordheim sent Mr. Powrie a letter talking about freight charges and saying, "You don't get extra dating on this," meaning that he got extra dating on his regular invoices. There is no doubt about it, ladies and gentlemen, that this agreement existed. It was negotiated with the sales people. And when Mr. Binnie, one of the junior credit men of Stevens, wrote a letter saying, "We are going to cancel you out if you don't pay, Mr. Powrie wrote to Mr. Motzenbecker and Motzenbecker apologized to Mr. Powrie, "Every time we get a new credit man he doesn't understand how we do business with you."

Mr. Schwebel testified that the agreement to hold and to call out was also extended to Mr. Powrie.

Why did Mr. Powrie need these things, need these special terms? Why did he need these terms over the contract period within which to buy his goods? Because he was 3000 miles away from the weaving sources. He finished his own goods and he sold as a subcontractor to the building trades, and these differences caused an unusual delay in payments to him, to Textura, from his customers.

Mr. Friedman testified that these terms existed,

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that the defendants had always let Textura go beyond the printed terms.

Miss Sharpe testified that when she came into the employ of Glass Fabrics that was indeed the case.

Mr. Powrie testified to it.

But the best evidence of these extended terms was the fact that this was the manner in which Textura paid its invoices to defendants over the years it did business with them.

Mr. Topkis stated in his opening 90? 120 days? 150 days? There is no dispute that the practice existed between the defendants and Textura with respect to these extended terms. That is not to say that once in a while Textura didn't pay a bill sooner to save interest, as Mr. Garvey suggested. And if this were not so, why didn't the defendants take more action, all these credit people writing memos back and forth to each other, why didn't they take action? If this account was such a crummy account, as they say it was, why didn't they take action. The fact of the matter is they didn't take any action; they sold Textura more goods and let it run more extended terms, because Mr. Powrie had negotiated an understanding with the sales departments of these companies that he was to have an extended term arrangement under

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which he could pay his invoices within 30, 60 days over the printed terms, in other words, 90, 120 days.

Why have we pointed out that these extended credit terms existed? What is their importance? Simply, ladies and gentlemen, they enable Textura to stay in business. And one other thing that proves they had these extended terms, the eminent Mr. Schuebel in his memo, in his conversations with Mr. Janetschek told Mr. Janetschek that he was not worried about Mr. Powrie, Textura, paying his bills within 120 days -- what did he say -- three months late, or something like that -- because he had always paid them that way.

Let me get back to the importance of these terms. The importance of these terms, ladies and gentlemen, if I am paying you $50,000 a month, if I have to pay that within 60 days instead of 120 days, I don't have the use of that $50,000 for the last 60 days. It tightens up my cash position. And, secondly, if the defendants say, "We're not going to ship you goods unless you pay on time," then [illegible] goods, either. I want to make that point that when you cut down on the extended credit terms [illegible] and out of the company. If I have $50,000 to use for 120 days it is different than if I [illegible] I

are in agreement on this one point, at least, that Textura needed these extended terms to continue in business; it needed the extended terms; it needed the fact that the defendants' warehouses had the goods and held them there until Textura called them out; it needed that, because Textura was in a unique business, because Textura was not selling to department stores, it was not selling to jobbers from whom it could turn around and collect is money right away; it was selling to contractors.

I don't know if any of you know how long it takes contractors to pay bills. There are delays in the construction business. You don't get your money right away. He had to finish, to fabricate, install. Maybe a building is being built down here on Broadway on which he has a contract to put the fabric in. Maybe that building is going to take a year to build. He may not realize on that fabric, he may not install that fabric until a year later. But he has to make these commitments for the fabric. He is sealing in volume. He is in a different business, and he told the defendants of this. So the extended credit terms are his life blood.

It is a different kind of business, and they honored these terms until 1966, when, as we have shown, and as I have outlined to you, the defendants shut them off

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pursuant to agreement. And when they were withdrawn he simply could not operate.

I would like to mention one more thing. Mr. Topkis said that these terms caused the defendants to incur expenses. And you heard the testimony, I believe it was Mr. Friedman, who testified that this was reflected in the price they charged Textura for the goods. So that these costs were reflected, the costs of holding these goods and warehousing them, as far as the record in this case is concerned, was reflected in the price they charged Textura.

Now, what do we have? We have a motive for the conspiracy established; we have a showing that Textura was absolutely defendend upon these three companies for fabric and for extended credit terms.

Now, the conspiracy. How did the conspiracy get started? It started with Jack Schwebel. That is where it got started. Mr. Clark, who had been previously one of the big officers in Clark-Schwebel, died in late 1964. Subsequent to his death, Mr. Nordheim testified, they instituted, Schwebel and Nordheim, instituted a policy, secret policy to tighten up on extension of credit and to refuse to give quality adjustments to their customers.

Beginning at about that same time Textura began

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to have increasing problems with the quality of the goods delivered by Clark-Schwebel. You heard Mr. Powrie testify to that. Schwebel and Nordheim began to move to get Textura to take its goods, to terminate these credit arrangements, to terminate these holding until called arrangements, and to terminate the period in which they paid their bills. But principally it was the quality. These quality problems built up. Textura, Mr. Powrie, did not back down. And what happened?

Clark-Schwebel was adamant in refusing to co-operate or compromise in the matter of quality. It dragged its feet in replying to Textura's claims, even after conclusive proof. You heard the testimony. You remember back to the first days that we put witnesses on in this case, that Mr. Powrie sent a letter to Mr. Nordheim and said, "Look, you can't blame our finisher anymore, because I am sending a panel of fabric that you yourself finished and that I put holes in. So it establishes that it is yur fault." And he tore that fabric right here to prove it.

What did Mr. Nordheim say? Nordheim came out in January Of 1966 and he looked at the fabric. He looked at Civic. You heard what he said about that. He said it was crap, to be polite. He admitted it was no good.

Still no adjustments on quality.

What is Nordheim doing at this point? He is keeping Kelly, of Burlington, and Moskowitz, of Dommerich apprised of his moves. He tells Kelly outright in a memo of June, 1965, when this quality dispute is in progress and Clark-Schwebel starts moving in on Textura, and he tells Moskowitz, and Mr. Powrie has testified that when he challenged Mr. Nordheim about talking to his banker, Mr. Nordheim didn't deny that.

Mr. Moskowitz said, "Nordheim tells me you are taking money from the company." Not true. This was part of a campaign by Clark-Schwebel to downgrade Textura.

How did Kelly respond to these communications by Nordheim? Right away he tells his boys to stop shipments when they are past due 60 days. You see, right away there is a pattern here, ladies and gentlemen, where Burlington followed Clark-Schwebel's lead in the matter of credit. What Nordheim told them, Burlington listened to and they acted on right away, sometimes without even checking with Textura.

I want to repeat that, we have a pattern -- Nordheim tells Kelley, Kelley takes action.

What happened in February of 1966? A lot of this has been gone over by the defendants. Textura took

a credit because it wanted to provoke resolution of these claims. It had not heard anything from Clark-Schwebel. What did Clark-Schwebel do? It struck back. It struck back viciously and in an unprecedented fashion.

In March of 1966 it invoiced Textura for all goods which until then it had been holding under the hold-till-call-out arrangements that I just discussed with you. It terminated Textura's credit, put them on cash right away. Mr. Schwebel tried to equivocate about that. But the fact of the matter is they stopped its credit right away. They held up its orders and they refused to process new orders.

These moves, ladies and gentlemen, were unprecedented in the entire history of Textura and Glass Fabrics' relationship with Clark-Schwebel, and we submit to you they were directly intended to force Textura to abandon its quality claims or go out of business.

In fact, Nordheim under questioning by me conceded that there was a question that was in his mind that Textura might go out of business as a result of the actions of Clark-Schwebel. What happened next? And this is important, because Mr. Tookis says he took a credit, he didn't pay his bills. Well, the fact of the matter is that Textura had paid Clark-Schwebel 50,000 big dollars in

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January of 1966 to reduce the account they had been complaining about. He brought his account down to $14,000 before they dumped all these other invoices on him, before they invoiced him for goods they were holding in their warehouse and had never even delivered to him. And I ask you, does that strike you as fair? They are holding the goods and they send him a bill for them?

What does he do after that? This again speaks to Mr. Topkis' assertion. He pays $20,000 on account to Clark-Schwebel and hopes to get a hearing on the quality problem. He comes to New York, and all they are interested in, "Give us some guarantees." They want guarantees before they sink the ship and drive him out of business, so they can be guaranteed of their money and let the company go under.

Now, on June 9 Clark-Schwebel institutes an arbitration. We don't care who instituted this arbitration, whether Mr. Powrie might have instituted if Clark-Schwebel hadn't. The fact of the matter is that Clark-Schwebel instituted the arbitration, and at that time Mr. Powrie was under duress. He had to take defensive action.

The fact of the matter is the arbitration was instituted requesting Mr. Powrie to pay for all these goods

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held in the warehouse and the yarn, yarn which had not been made into fabric yet, to the tune of $92,000, and all these yarns and fabric which were in the warehouse was subject to this quality dispute, these styles.

Now, this is the point where Clark-Schwebel, Nordheim and Schwebel, really began a drumbeat of communication to the other defendants to line them up, to get them on Clark-Schwebel's side to put Textura under.

Nordheim communicates to Moskowitz of Dommerich; Schwebel communicates to Janetschek of Stevens; Knisel communicates with Kelly; Kelly calls Knisel, Schwebel calls Kelly. They all work for separate defendants, but they are all working together, we contend, at this time.

What does Nordheim say in some of these communications? He talks about signed contracts on Mo-Vac, that "Powrie won't get the $350,000, but we will get the process; we will renegotiate the contract to provide just for royalties. Keep this in strict confidence, because we don't want to reveal these dealings until later."

These are the type of people we are dealing with, ladies and gentlemen, people who are not open. It is as simple as that. People who are covering among themselves to try to seize advantage against Textura and do the best they can to keep it secret from them.

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Nordheim says that Powrie has admitted that his quality claims are not good. Do you really believe that? That is ridiculous.

Mr. Topkis suggested that Nordheim told Kelly, "Well, we want to settle, of course, we want to settle and get you guys on our side to put the pressure on him to settle.

Mr. Schwebel says, "Powrie doesn't dispute the obligation to take out these goods. Do you believe that? He sent back all invoices saying, "It is contrary to our agreement," admitting that certain of these goods were locked up on other jobs. A lot of information was left out.

Schwebel said to Mr. Janetschek, "You better look and see how much fabric you are holding. A suggestion to bill it out, to do the same as we have done.

Defendants have spoken a lot, and you have heard the witnesses from this stand testify that all these exchanges which I tell you about, which I have been discussing with you -- and you have seen the memoranda, we have circulated them to the jury, sometimes both defendants and plaintiffs have circulated the same memoranda to the jury, all evidence of communications between Knisel of Stevens, Kelly of Burlington, the people from Clark-Schwebel.

When Mr. Topkis got up to question these people they all said, as if to a man, this was a routine exchange of credit information, this was a routine exchange of credit information; it came out of them like a record. And you will hear the judge tell you that the routine exchange of credit information just for that purpose alone is not unlawful.

I ask you, were these communications among these defendants with this background the routine exchange of credit information? I suggest they weren't, and I invite you to take a look at the sequence of

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events with me. Take a look at some of these so-called routine exchanges of credit information.

On July 6th the generous Mr. Nordheim offered Textura a settlement of this $92,000 claim which had been apparently reduced after that, according to Mr. Schwebel, to some extent. He offered them a credit of $7000 conditioned on the prior payment of $66,000 in installments of $25,000 in August, $25,000 in September, and $16,000 in October. This is in Plaintiffs' Exhibit 145.

Mr. Powrie told him, "I can't make the payments. Textura can't make those payments. It's impossible for Textura to make those payments." In fact, on July 8th Textura submitted an answering statement in arbitration rejecting Clark-Schwebel's claim and making a claim of its own.

On July 29th -- get the dates: July 6th Mr. Powrie tells him, "I can't make these payments that you are asking me to make -- on July 29th, and on June 9th, before that, they just instituted the arbitration. On July 9th Powrie says, "I can't make these terms. July 29th a meeting is set up at the St. Regis to discuss settlement.

What are Schwebel and Nordheim of Cla[illegible] -

Schwebel doing between those times? Schwebel phones Janetschek of Stevens at a time when Janetschek testified there was no reason for Stevens to make a credit inquiry on the Textura account. He said, "The Textura account is in good shape. I wouldn't have any reason to call Jack Schwebel." And he also calls Knisel of Stevens, too, Janetschek's boss. And what does he say? He says to him, "Look and see if you have any old cloth."

First he tells him what he has done, he tells him he has billed out all his old cloth, he has shut off the orders, he has put them on a cash basis. Then he tells them, "Why don't you look and see if you have any old cloth." The suggestion: if you do, follow our lead and bill it out.

He says, "We have cut them off, and I have been talking to my friend Kelly over at Burlington, and they have cut him off. And I understand they have placed some orders with you."

What's the suggestion, ladies and gentlemen? The suggestion is: you do the same or we are going to go to arbitration and bankrupt the account and you will end up with nothing.

Now, you say say, well, if Clark-Schwebel

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is putting the pressure on these other defendants doesn't that mean that they are innocent? I think the judge will charge you that even if Stevens and Burlington agreed with Clark-Schwebel because of pressure by Clark-Schwebel, or false statements by Clark-Schwebel, or any reason, that they are still culpable, if there was an agreement, a cooperation, a tacit understanding, a following each other's lead.

Now, who was Schwebel who was making these calls? Sure, Mr. McGanney has suggested that they didn't have a credit department so maybe it was okay for Schwebel to call. What was Janetschek's understanding? He said Schwebel wasn't a credit man, he was a salesman. He wasn't a person that Janetschek would contact for credit information, he had never before called on the Textura account. In fact, Janetschek considered Schwebel so far removed from credit matters that he said, and I am quoting, that he would never take it upon himself to contact Mr. Schwebel for credit information on an account. And Janetschek knew that Schwebel was a former employee of Stevens.

What did Stevens do? Get the picture. This is on July 6th. July 3th Schwebel gets on the phone. July 6th Powrie tells Nordheim, "I can't

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meet these terms." July 8th Schwebel gets on the phone with Janetschek and says, "Put some pressure on this guy, he is giving us some trouble."

What does Stevens do with this account Mr. Janetschek says is in good shape? We suggest to you that in direct response to Mr. Schwebel's call, just as Schwebel suggested that Burlington withhold approval on the new orders which Textura had tried to place with Burlington -- and I would just like to parenthetically put in that at this point, at this point, Textura had attempted to place orders with Burlington, and they were in the process of being held up, including this fabric Crown, this fabric Crown had already been held up. The new contract for Crown, a fabric he desperately needed, had been held up by that time.

So I am suggesting to you that Schwebel suggested to Stevens that they withhold approval of the new orders which Textura had come to them to place to see if it could get some source of fabric here.

What did they do? Mr. Knisel sent him a letter, sent Mr. Powrie a letter: "I am holding up your new orders, holding up credit approval on your new orders. I am putting a credit limit of $20,000 on your account," which was already at that time near

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t amount. And I batted it around with Mr.
sel but I think the sense was if I owed you $20,000
out put a credit limit of $20,000 on my account I
ter come up with some money before I get some
ds.

He also requested a personal guarantee.

Then Knisel turned around and called
webel and said, "This is what I am going to do.
m holding the line with him."

So Mr. Powrie gets this letter from Knisel,
ch, incidentally, says, "You better come to New York
discuss this because it is too important to talk to you
r the phone." In other words, come in and report
e.

Now, at this time what's Burlington doing?
there being calls made to Burlington? Yes, there
. And were these routine? I suggest they
not.

Mr. Nordheim testified that subsequent to
e that arbitration was commenced Nordheim called
ly more frequently on the account. Why did he call
more frequently? I asked him this. Do you know
t he said? He said, "When you are in trouble what
you do, you protect yourself."

This isn't a routine call, ladies and gentlemen. These were nto routine exchanges of credit information. That statement alone is clear evidence that Nordheim's purpose in making these calls was to get his buddies, his co-conspirators, the co-defendant Burlington, to take action against Textura's account.

By protecting himself he meant he could get help from his friends.

What did Burlington do in response to this? And consider these coincidences, ladies and gentlemen. On April 25th, going back a minute, Powrie comes to New York and he meets with Schutz and Schutz says to him, "We want a personal guarantee as a condition of continuing to do business."

On April 27th he meets with Schwebel and Nordheim, and Schwebel and Nordheim say, "We want a personal gaurantee from you," and they call Grafstrom and they say, "You better get us a personal guarantee or we are not going to do business with Textura any more."

Is this a coincidence? No, it isn't, ladies and gentlemen, it's parallel action. These people had been in touch with each other all along and they knew the sensitive point at which to strike.

Now we get to June. All this time Burlington -- and I know this is hard to follow and I am going to ask you to bear with me -- Burlington and Textura and Mr. Powrie were having a quality dispute. They come up to a meeting on June 2nd with Mr. Vollers, the same Mr. Vollers who received all the complaints, the same Mr. Vollers who said, "Unless Mr. Powrie accepts what we are dishing out, we are not going to make any more goods for him," the same Mr. Vollers who heard the complaints from Qual-Pak -- he has a meeting with Mr. Powrie in which they try to work out these quality difficulties. Mr. Powrie proposes, "Well, you hold the seconds and just ship us all firsts and we will see how that works out.

Mr. Vollers says, "We will send a man out to Los Angeles to take a look at the situation, Mr. Buck," and this is on June 2nd. The very same week Clark-Schwebel institutes arbitration and Nordheim communicats with Burlington. In that very same week, ladies and gentlemen, all of a sudden Mr. Powrie gets a call from Mr. Erskine who says, "Your contract for 4881 for Crown is cancelled."

Mr. Powrie never cancelled this contract. Sure, he was willing to hold up the orders for the

new styles pending resolution of this quality dispute, but Crown wasn't a new style. Crown he desperately needed and the memoranda from the defendant's own files established he desperately needed it. You saw the telegram I read from Mr. Erskine: "Textura desperately needs goods re: Crown."

Four days after this arbitration is instituted by Clark-Schwebel Erskine calls him and says, "Your contract for Crown is cancelled."

On the 22nd of June Vollers himself calls Mr. Powrie, and he is a little bit confused, he is a little bit subtle about what he says. He says, "We are turning the tap on again on Crown."

I ask you, ladies and gentlemen, what does that mean? If you turn the tap on again it means you have stopped the weaving. And the proof of that is, ladies and gentlemen, that they stopped the weaving as in defendant's own exhibit, as I showed you before, as Mr. Hardison pointed out, that in August and September, zero deliveries.

Now, let's go a little farther. On June 30th Nordheim again calls Kelly of Burlington, telling him Textura is a querulous account, constantly making complaints.

By that time Cann had already given the message to Powrie, Jack Cann of Burlington, saying, "In view of the large pending arbitration with Clark-Schwebel we can't give you credit. Give us the personal guarantees and your personal financial statemnts of yourself and your wife."

On July 8th, right after, again -- you will remember that Schwebel had called Knisel on July 8th -- on July 8th Nordheim calls Kelly, the same day that Knisel was talking to Janetschek about this account Nordheim calls Kelly about the account, and he tells Kelly, "They can't pay these terms and we are going to go to arbitration and it may bankrupt the account."

Now, ladies and gentlemen, these aren't routine exchanges of credit information at all. This was a conspiracy, a conspiracy to shut off the credit of Textura and to dry up its goods. After Mr. Powrie gets the letter from Mr. Knisel of Stevens telling him to come to New York he goes to New York. Mr. Knisel takes the same position. He continues to hold up the orders, and he continues to hold the line on credit. And he tells him, "You better go over there and settle with Clark-Schwebel."

At the same week he meets with Schutz of Burlington, and Burlington says the same thing to him, "If you want to continue to have an open account with us, you better go over and settle with Clark-Schwebel."

You know, it's a funny thing, at that same meeting Mr. Knisel told Mr. Powrie, "I'll give you some credit if Burlington will and I'll process orders for you, if Burlington will."

Now, this is before the Clark-Schwebel arbitration. So in Powrie's head he knows that they are lined up against him before the arbitration.

Now, there is something significant about -- oh, yes, oh, yes, and what does Mr. Knisel do, of Stevens? He calls Mr. Kelly, and this also wasn't a routine exchange of credit information. In fact, Mr. Knisel testified it would not have been usual to call Mr. Kelly on an account. And what does he report? He reports that he tells -- he has told Kelly, "I will process orders if you will process them, I will give him credit if you will give him, up to a specific line.

Mr. Knisel -- and this is very interesting, ladies and gentlemen -- we have introduced all these

memoranda, and Mr. Nordheim apparently thought that Mr. Kelly was a very accurate reporter of what he said to him. The only statement that was ever denied by anybody on that stand was Mr. Knisel saying, "No, it was false when Mr. Kelly said that I told him that I told Powrie, 'I'll only process orders if Burlington goes along with you, and I'll only give you credit if Burlington goes along.'"

In other words, ladies and gentlemen, Mr. Kelly was an accurate reporter as long as it didn't suggest there was an agreement between the parties, but when he wrote down the truth, that there was an agreement between the parties, Mr. Knisel denied it.

One other thing. Schwebel didn't even call Stevens until after this arbitration had been instituted. He didn't tell Stevens anything about this back in March of 1966, when he had already invoiced for all the goods, cut off the credit, refused to process any new orders. In fact, he didn't tell him until after Powrie had refused to go along with the deal that he said he couldn't meet, so this wasn't a routine either. It had a specific purpose, and that was to get Stevens on board.

What happened after this? Mr. Powrie and

Mr. Crafstrom went over to Clark-Schwebel, went over to the St. Regis Hotel and they met with Clark-Schwebel. What happened? Clark-Schwebel was very magnanimous. They offered him terms, or they demanded terms, rather, that was the payment of $70,000 over the months of September, October and November, the ordering of fabric utilizing this yarn that they had stored up, and a credit of $12,000 contingent on a prior satisfaction of the $70,000.

Do you know what this was, ladies and gentlemen? The prior demand was $16,000 and a credit of $7000. This was $70,000 and a credit of $12,000.

They had come down a bit $1,000 since July 6th. And why were they able to demand almost the same terms, the same terms which Powrie told them he couldn't pay back on July 6th? They were able to demand these terms because they knew they had the other guys on their side. They knew they had Burlington and they knew they had Stevens on their side.

Why did Textura agree to these terms? And you have heard Mr. Powrie testify to this. And Mr. Nordheim put him on notice that it was difficult for them to meet these terms, for Textura to meet these terms. So they were on notice. I just want to

throw that in, they were on notice. Mr. Grafstrom told them it was difficult.

Why did Mr. Powrie agree? And he testified to this. He only agreed because of the pressure from the three sides. He couldn't stand up against these three giant corporations when they all put the screws to him. And of course once Nor[illegible]m had these terms he had complete leverage over Textura. He had a written document and he could use it to bankrupt the account. But as events turned out he didn't need to. Because what was the result of this?

I want to add one more thing. Not only had Clark Schwebel shut him off, put him on a cash basis since March, completely shut down their weaves, but Clark-Schwebel had refused to process new orders from them. They went over to Stevens and said, "Will you process this order?" and Stevens came out with some kind of an excuse, they couldn't weave it because it was a back-to-back line, they said. You didn't see them produce anybody in court to support that. Burlington just let the order -- took the order at first andt hen just let it go by the board, never wove it.

So what was the result? We are bringing

you up now to July of 1966. What was the result of this concerted action? In a few months time, from March of 1966 right up to the end of July, 1966, the extended terms had been shut down.

I would like to add parenthetically that the fact that Stevens had subsequently processed these new orders which in fact were never delivered in 1966, that they did this after the settlement, that they were good guys in November and October, after Mr. Knisel admitted that Mr. Powrie was already substantially in bankruptcy -- that doesn't help them a bit, that doesn't mitigate the situation a bit, because as of July and August Textura was already effectively out of business.

What happened? Stevens had slung these terms down to 60 days: Pay in 60 days or we won't ship. You have seen memoranda. Burlington took the same position: Pay in 60 days or we won't ship.

They said pay a dollar and a half for a dollar; they said pay cash. They said, "We won't let you call out goods for cash, you have to apply all your money against the old invoices."

What did he have from Clark-Schwebel? Nothing. No fabric available.

What did he have from Burlington? No fabric available.

In other words, ladies and gentlemen, in June and July Textura was substantially out of business. Clark-Schwebel wasn't going to weave for him again. Schwebel testified he wasn't taking any orders and they refused the order for Morro.

How about this agreement, the big agreement that Mr. Tonkis says -- Mr. Tonkis says, "See, that didn't hurt him, that couldn't hurt him, they only paid $5000 on that." But what was the effect, ladies and gentlemen? Remember, go back to what I told you before. There are only three suppliers of this kind of fabric. What in fact happened? Under that agreement Mr. Powrie had to take out the fabric that was listed in that agreement, which fabric was of bad quality. The only fabric that was good quality was committed on jobs that he couldn't realize on for six months. In fact, these jobs weren't completed until after they had already gone out of business. So he had no fabric from Clark-Schwebel.

I would just like to refer to an exhibit of -- something that Mr. McCanney put in evidence this morning, the 1966 shipments to Textura. This was a

company Textura had bought $150,000 worth of fabric from in the ye ar before, and had bought the sare amount from Burlington. Listen to what they had to operate on. In March, no fabric from Clark-Schwebel. In April, no fabric from Clark-Schwebel. In May and June he takes in some of the good fabric that he can use. In July, $478 worth of tabric. In August, no fabric. In September, $1300 worth of fabric. In October, $2000 worth of fabric. In November, $1700 worth of fabric. In December, none.

How about Burlington, ladies and gentlemen? Let's just take Crown. August, zero. September, zero. October, a big 79 yards. November, 2800 yards. December, none.

Total fabrics, August, 4200 yards. September, none. October, 3300. November, after he is already, as Mr. Emisel says, substantially in bankruptcy, 7200 yards. December, none.

Satin boucle: September, none.

The fact of the matter is, ladies and gentlemen of the jury, that this company was substantially out of business at this point. And as I say, you have heard Mr. Powrie testify, and I don't think there is any dispute, they were requiring to pay within 60

days and they were holding up his goods if he didn't.

So what was the result, ladies and gentlemen? The result was that it is uncontested that there was no extended credit terms available to him and his cash was restricted as a result.

What was the effect of this on his business? This is a time when he has a million and a half in contracts and a million and a half in specs.

But look at the results. After a profitable first six months -- and this is on the Berman statement, Plaintiffs' Exhibit 47 -- mde $550,000 profit. The last four months after the defendants' actions had taken effect he is out $40,000, he is down $40,000.

This is true with any indicia that you want to look at. Look at the sales. His sales -- and we concede June was a bad month; anybody can have a bad month; June was a bad month for him -- but look at how his sales drop out. Look at the first six months: 150,000, 149,000, 150,000, 140,000, 152,000, 127,000, down to 61,000 back up to 102,000. And look at the last three months: 66,000, 64,000, 75,000. He can't make money. He is out of business, as a matter of fact.

Your Honor, could I be reminded of what time

I started.

THE COURT: You started a little over an hour and a half ago.

MR. BURGESS: I will attempt to wrap this up very quickly.

Now, ladies and gentlemen, the defendants have made a point. They said this company was going nowhere. But the fact is it was going everywhere. We concede it had bad years in 1965 and '64, but you heard Mr. Powrie testify this was because of the expansion. They knew where they were going.

Just to show that, I think we would like to illustrate what's the most important indicia here of what the defendants started to perceive. Their accounts payable were down. In June of 1966, Mr. Janetschek conceded it was in good shape. Their accounts payable to the defendants --

MR. TOPKIS: Your Honor, this is not in evidence.

THE COURT: Haven't you seen it?

MR. TOPKIS: No.

THE COURT: After all our discussion?

MR. TOPKIS: No, your Honor, it has not been shown to us.

THE COURT: At least you should have the
esy of showing it to counsel.

MR. BURGESS: Your Honor, I did show them --

THE COURT: Try going along without it.
not an exhibit.

MR. BURGESS: In any event, ladies and
lemen, and I don't think the defendants would
ously dispute this, the fact of the matter is
Textura's account with Stevens and Burlington was
ood shape in May and June of 1966. Stevens admitted
this was so. Dommerich wrote a memo to
ers and said, "Our account is satisfactory."

Let's take a look -- by the way, the fact
Dommerich cancelled after these devices effectively
our client out of business doesn't negate that.
ay and June and July, when they were taking actions,
account was in good shape.

Based on Burlington's own documents, from
gh of $73,000 at the end of 1965 the account
paid down by June of 1966, the balances ranging in
low thirty thousands.

The time within which Textura paid its bills
been reduced as well. March invoices were paid
une, closer to 90 than to 120 days previously

taken. In July they were brought down even farther. So they had no complaints.

This was an improvement as even Mr. Schutz conceded, that Mr. Powrie was trying the best he could, although he had this understanding with the defendants to voluntarily reduce it, but not to be shut down to 60 days and to 30 days. He couldn't live with that.

Furthermore, Textura's expenses were down, and this is all in the financial statements that have been introduced in evidence. Its profits were up, as I testified to. He made $55,000 over the first six months of the year.

This is true whether this famous Del Webb job the defendants have harped on incessantly were in or out of the statements. They made a profit for the first six months of the year. They brought their inventory down. Their overall accounts payable were down.

So what do we have here? The defendants were looking at a picture of a healthy company, a company that they said even in September of 1966, "It never looked so good, it was on its way," Mr. Friedman had made projections to show it was on its way.

And that's true of its sales as well, ladies

and gentlemen. It sales were up, as I have indicated to you, up over the first six months of the 1966 business year.

Frankly, we just don't think it lies with defendants to say the second six months they didn't do well because the second six months they couldn't do well because defendants had put them out of business. Defendants had shut off their fabric and shut off their credit.

I want to talk briefly about the issue of damages now, which was discussed last by Mr. Topkis, and I want to state briefly about the industrial price-fixing claim that we talked about.

There is evidence in the record from which you could infer that the defendants jacked up their prices 3 to 5 per cent on these fabrics which they sold to the defendants, and we urge you to bring in a verdict for whatever amount -- and we don't scorn -- for whatever amount that showed.

I want to turn you now to the substantial damages that we want in this case. First, for Mr. Powrie, who, contrary to defendants' allegations, is a stable guy, a guy married for 33 years, a guy who has put his heart and soul in this business. I want to

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mention briefly this matter of this guarantee.

They say why didn't he give a guarantee. He had guaranteed this company until the cows came home. He guaranteed the entire account to Dommerich for a quarter of a million bucks. He signed performance bonds. He put his money, his own money, into this company.

Sure it was thin, sure he needed the defendants to survive, but don't you think he didn't put every nickel he had into this company, he did, and he got his friends to put in whatever they wanted to put in.

There is no obligation on Mr. Grafstrom to bail out this company when the defendants were putting it out of business. There was no obligation on Powrie to put money into this company when he felt the defendants were putting him out of business, and he didn't. He always paid his bills. He always paid his bills.

And the defendants have suggested he didn't pay his taxes. They sold marked-up, jacked-up-price goods to the government. You know, they made good profits from that.

Now, the damages to Mr. Powrie, the undisputed testimony reveals he had a salary arrangement

entitling him to 5 per cent of gross sales per year up to a $50,000 maximum. This means if Textura had gross sales of $1 million Mr. Powrie was entitled to a $50,000 salary.

If the court charges you that Mr. Powrie's salary is a proper element of damages, and we suggest it will, you may award him $50,000 for each year you believe Textura would have stayed in business after '66 and would have had gross sales of at least a million dollars.

If you find for any year after 1966 that Textura would have had gross sales less than a million dollars, then you simply take 5 per cent of whatever lesser amount that is and award it to Mr. Powrie as his damages.

Caveat: Not for 1967, because we concede that defendants have shown that he earned $50,000 in 1967. But the records are clear the defendants have not shown that he earned a nickel thereafter.

So that you can award Mr. Powrie 5 per cent of any amount you feel Textura would have earned subsequent to 1966, with a caveat that you skip 1967.

How about Textura? Two categories here. First, the lost profits Textura suffered as a result

of the conspiracy while it was in business. The second, the lost profits it suffered, it would have earned -- I am sorry. The first category is the lost profits, the profits that it lost in 1966 as the result of defendants' efforts. The second category is the profits it would have earned after 1966.

As far as the period, the lost profits incurred by Textura during the period it was in operation, there are a number of documents introduced in evidence, and they list unfilled contracts in existence at the time Textura went out of business on December 15th of 1966. The total of these unfilled contracts is $337,167.

There was also testimony to show that Textura had unfilled orders of $1.5 million, and $1.000 million in specified jobs.

You will recall from the testimony of Mr. Povrie that a specified job was one in which Textura had prepared the specification for the drapes in connection with high-rise jobs which the builder or contractor would then receive bids on.

But these just weren't something out of thin air. Mr. Povrie testified that in every instance that Textura or Class Fabrics wrote the specifications for a drapery job it always got the job. He testi-

fied:

"Q During the period ftom 1958 through 1966, when you were running Glass Fabrics and then Textura, can you remember any one instance in which the published draper specification referred to one of either Glass Fabrics' fabrics or Textura's fabrics that either Glass Fabrics or Textura did not get the job?

"A No. I can't recall any such instance."

And an example of one of these specifications is Plaintiffs' Exhibit 853.

So if you find that Textura remained in business it would have received gross sales of $1.090 million in connection with these specified jobs, as well as the $337,167 that I mentioned to you on its contracts.

Now, you apply a profit figure which we derive from Plaintiffs' Exhibit 47, an audited statement, a statement by Textura's auditors, and it is a 6.9 per cent net profit figure. You apply that to these signed contracts of $337,000 and you come up with a figure of $23,264. You apply the same net profit figure to the specs of 1.090 million and you come up with a figure of $75,210 for a total of $98,474 out-of-pocket

losses before any projections are made.

So that's $100,000 right there.

Now, I just want to call your attention to this. Plaintiffs' Exhibit 47 we rely on is the best evidence of Textura's condition in the first six months of 1966. Prepared by Mr. Berman, it shows that Textura had finally turned the corner, obtained sales of $800,000 for a six-months period and profits of $55,000. We think it is fair for you to assume that if it weren't for defendants' conspiracy these figures would have been at least matched by Textura during the last six months of its operation in 1966. We feel it is clear that they didn't operate in normal fashion due to the efforts of defendants, the successful efforts of the defendants.

Finally, and I will be leaving you shortly, and I am sure you are glad to hear that, I just want to address the matter taken up by Mr. Topkis of the projections.

This is the subject of the additional lost profits Textura would have earned had it remained in business. Of course, it must be obvious to you that there is no way that anyone, be he a businessman, architect, scientist, or anything, could predict exactly

profits or losses that Textura would have earned had it stayed in business. That is by its nature a matter which only can be estimated. Although the judge will charge you as to the law on this matter you should know that you can make an estimate of lost profits based on reasonable assumption, so that in the end you may find damages based on lost profits so long as you find there is sufficient evidence in the record for you to arrive at a just and reasonable estimate of the damage caused to plaintiffs by defendants.

As I told you previously, there is no possible way for you to determine with exact precision Textura's damages subsequent to 1966.

In answer to defendants' argument, however, that damages can't be based on speculation and assumption, we say, and we feel we have proved, that there is a reasonable basis in the record for you to determine damages. If the law were otherwise, if the law were as defendants contend, every antitrust conspirator, the defendants who drove a company out of business, they would just be immune. They could say, "There is no way the jury can estimate damages, so we are free."

But the Supreme Court has stated, fortunately for us, contrary. The defendant whose wrong-

ful conduct has rendered difficult the ascertainment of damages, of the precise damages suffered by the plaintiff, is not entitled to complain they can't be measured with the same exactness and precision they might otherwise possibly be.

In this connection I urge you ladies and gentlemen to bear in mind the obvious trend of plaintiffs' business at the time it was driven out of competition by defendants. This trend is best illustrated starting with 1962. In 1962 Glass Fabrics had approximately $900,000 in sales and a profit of $40,000.

In 1963, Glass Fabrics had sales of approximately $1.1 million and a profit of $50,000.

In 1964, you will recall Textura embarked on a tremendous national expansion involving tremendous expenses, and a severe anticipated loss as a result. There is no question that Mr. Pourie conceded and testified at length they anticipated, they knew they were going to lose money, they wanted to, they are going to go national.

Thus in the '64 gross sales, $1.064 million, and suffered a loss, which they knew it was going to lose, of $114,000.

In 1965, as you will recall from the

testimony, this was Textura's year of consolidation. During this year it increased its sales to an unparalleled $1,413 million, and at the same time reduced its loss to only $32,000.

Thus, as 1966 began Textura stood poised on a springboard of success. It had expanded at great cost in 1964. It expanded at great cost in 1964 and in 1965, due in large part to the measures of Mr. Friedman, whose deposition we read, it had reduced costs and it was ready to turn the corner and go into this bright new future that Mr. Topkis makes some light of, a future of increasing sales and profits, and this prophecy was borne out by the first six months of 1966, where Textura had unprecedented sales of $800,000 for the first six months and profits in excess of $55,000.

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2 Again, in the first six months of 1966 Textura
3 had unprecedented sales for the six months of $800,000,
4 and profits in excess of $55,000. Again, although the
5 Court will charge you with the law, you are entitled to
6 award Textura damages even if you find they never earned
7 a penny. The Court of Appeals --
8 MR. TOPKIS: Your Honor --
9 THE COURT: I suggest you let me charge the
10 jury.
11 MR. BURGESS: I want to get right back now to the
12 question of estimating the lost profits that Textura would
13 have earned had it remained in business. As has been
14 previously demonstrated, there is no way that this can be
15 done with exactness or precision -- plaintiffs did the
16 best possible thing, they hired a distinguished professor
17 of economics from the University of Southern California with
18 whom they had no previous contact. This professor in
19 large part was selected because he acts as a business
20 consultant and engages in the practice of forecasting sales
21 for many customers. As most of you know, virtually every
22 large company has sales forecasts covering periods of time
23 in the future so that it will be able to budget its expenses
24 and plan for the future.
25 Accordingly, Professor Bruner was told to make a

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projection as to what Textura's sales would have been had it remained in business from the period 1967 through 1977. Plaintiffs did not control the report. Professor Bruner first testified he had to find a proxy, he had to find a substitute market. He asked, "How am I going to project these sales?" These are necessary. These are not fantasies, as Mr. Topkis suggested. He considered proxies in the construction industry, but he rejected those because the data was insufficient.

The defendants introduced data with respect to drapery and upholstery fabrics. But Professor Bruner didn't use this sub-category; he didn't use this proxy. Why? Because, as you heard, Textura had nothing to do with household draperies. Textura was in the business of sub-contracting draperies for high-rise office buildings. It didn't care about somebody buying draperies from Woolworth's. It was in a big business, a business of installing draperies in office buildings. So Mr. Bruner came up with a category, he came up with this Department of Commerce code for drapery and hardware and blinds and shades, which is the nearest kind of thing to the business Mr. Powrie was in. And Mr. Bruner determined that this was the closest proxy he could find. So he used this to determine what share of Textura's market would have been

in the years 1967 to 1976. He determined that during the period from 1962 to 1966 Textura had obtained about 7 per cent of this proxy of market in California and he then made the reasonable assumption that because of its nation-wide expansion it would take Textura somewhere from three to five years to achieve a 7 per cent share of the national market.

Dr. Bruner then simply made mathematical computations showing what Textura's sales would have been from 1967 through 1976 based on those reasonable assumptions. These forecasts are set forth in Table 4-A in connection with Professor Bruner's report, Plaintiffs' Exhibit 871-A.

As shown by Table 4-A Professor Bruner forecast sales beginning in 1967 of $3,600,000 to 1976 sales of $33 million. You must bear in mind that Professor Bruner's forecasts are solely of sales, and not of profits or losses. You must also bear in mind that defendants did not introduce any expert testimony whatsoever to contradict that of Professor Bruner.

For estimated profits, plaintiffs relied on the expert testimony of Professor Mosich, an accounting professor, author of accounting books, and former chairman of the accounting department of the University of Southern California.

Professor Mosich's credentials are such that he has been employed by the United States Attorney's office in Los Angeles as an expert witness. Professor Mosich testified and prepared a report based on Dr. Bruner's report showing the profits that Textura would have earned for each year from 1967 to 1976 had it achieved the sales forecast by Dr. Bruner.

As Professor Mosich has testified, and as reflected by the figures in his report, he was very conservative in forecasting operating expenses. Based on Professor Mosich's most conservative forecasts as revealed by Table 3 of his report, which is Plaintiffs' Exhibit 872, Textura under the most conservative of his projections would have earned $7000 in 1967, $364,000 in 1968, $711,000 in 1969, $1,150,000 in 1970, and so on.

As with Dr. Bruner, defendants did not produce an expert witness to contradict the testimony or report of Professor Mosich.

You are not bound to accept these projections, ladies and gentlemen. You may make your own estimates in part in reliance on experts or in complete disregard of them.

In making determinations as to what Textura's profits would have been had it remained in business after

1967, you may also be guided by the sales projections prepared by Allen Friedman, the general manager of Textura in 1965. These projections are in evidence as Plaintiffs' Exhibit 48 and they were prepared by Mr. Friedman at a time when there was no idea of litigation. So they are not subject to the same attack that Mr. Topkis makes on these distinguished professors. There was no idea of litigation in his mind at the time, and according to Mr. Friedman's latest projections, if Textura as of 1966 had sales of $100,000 a month, or $1,200,000 on an annual basis, it would earn $5,740 per month, or approximately $70,000 a year.

According to Mr. Friedman's projections, if Textura had sales of $150,000 a month, or $1,800,000 a year, it would have earned approximately $37,600 per month, or on an annual basis approximately $450,000 per year.

Again, in estimating the profits Textura would have made had it remained in business after 1966, you can disregard the expert's testimony and projections, as well as those of Mr. Friedman, and using your own experience and judgment make a determination based on Plaintiffs' Exhibit 47, which shows that for the first six months of 1966 Textura had sales of $800,000 and profits of $55,000.

As previously noted, there is evidence from which

you can find that if defendants had not conspired to drive plaintiffs out of business, Textura would have doubled these figures in 1966 and would have earned $110,000 on $1,600,000 worth of sales.

Based on the foregoing you can find, if it is your opinion, from 1966 on Textura would have had sales of $1,600,000 and upwards.

In conclusion, ladies and gentlemen, I have taken enough of your time. We feel that there is a reasonable basis on which you can make reasonable estimates of damages. We have shown you the dependence of Textura on these companies, the fact that these communications were not routine credit exchanges of information, the action that was taken by the defendants to shut off Textura's credit, to shut off its supply of fabric, to coerce it to settle with Clark-Schwebel, and we have shown you that, in effect, put them out of business beginning in August and September of 1966, and that there is a reasonable basis for which you ladies and gentlemen can make an award of damages. So we urge you to consider that matter and return a verdict for the plaintiffs in this case.

Thank you very much for your attention and your patience.

THE COURT: Do you have any brief rebuttal?

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MR. TOPKIS: Under five minutes. I will make it three.

Ladies and gentlemen, just a couple of comments. I heard my friend say that the first six mo nths of 1966 were a record for Textura. But I also heard him say that by June and July Textura was substantially out of business. Why? There was no cutback on credit; there were no payments to Clark-Schwebel; no refusal of delivery. But according to him, they were substantially out of business. I will take his word for it.

And Stevens and Burlington thought they were in fine shape, didn't know what was going on until July, when Textura was substantially out of business. So be it.

My friend suggests that Textura would have had gross sales of $1,095,000 and $335,000 in actual contracts. He didn't tell you over how many years those jobs would be accomplished, but all of a sudden he had $100,000 in profits. I never saw a man make $100,000 so fast.

Just one final thing. Over and over again I heard Mr. Burgess talk about our having fixed prices on industrial fabrics, and for that reason we are apparently to be damned unto eternity. He said we were locked together as price fixers, we were fellow price fixers, and "there is honor among thieves," and other choice words.

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That is a great way not to discuss the issues. There is no doubt about these three defendants being losers once. It had nothing to do with Textura, nothing to do with Mal Powrie. But these opportunists saw in our guilt in another area an opportunity to get rich. That industrial price fixing has nothing to do with this case and the suggestion that somehow or another the tar from that ought to be used to tar us here I think is outrageous.

Thank you very much.

THE COURT: I don't see any purpose in charging the jury now at this late hour, so we will adjourn now to 10 o'clock tomorrow morning.

(Jury excused.)

(In the robing room.)

MR. TOPKIS: Your Honor, I want to request this of your Honor in the arrangement of the special verdict. It seems to me prejudicial to put in Question 1 the matter of industrial price fixing. It would seem to me that it would be more appropriate to have that question follow the so-called conspiracy.

THE COURT: I will change the order.

MR. TOPKIS: I appreciate that.

THE COURT: I thought myself looking at it it was out of place.

ms 2317

CARLYLE MICHELMAN, Trustee of Textura, Ltd., in Bankruptcy Proceedings, et al.

vs. 66 Civ. 4230

CLARK-SCHWEBEL FIBER GLASS CORPORATION, et al.

New York, November 12, 1974;
10:45 o'clock a.m.

(Trial resumed.)

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(Jury in box.)

THE COURT: The record should indicate that Juror No. 3 is not here and we are supplanting that juror with an alternate. I assume there is no objection.

MR. TOPKIS: No objection.

MR. BURGESS: No objection.

(Alternate Juror #1 takes his place as Juror #1)

THE COURT: Members of the jury, you are about to undertake your final function as jurors, and that is to decide the fact issues that are in this case. But first, I want to express my thanks to each one of you for your faithful devotion to your duties in this case. You, as the jurors, have a heavy responsibility and that is to

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assure that a just result is reached in the determination of the differences between the plaintiffs and the defendants in this case, for it is basic to the administration of justice that the determination on questions of fact be made fairly, honestly and conscientiously.

As jurors, I want to impress upon you that you are the sole and exclusive judges of the facts, you pass upon the weight of the evidence, you determine the credibility of the witnesses, you resolve such conflicts as there may be in the evidence, and you draw whatever reasonable inferences are to be warranted by the facts as you may find the facts to be.

My function at this point in the trial is to instruct you as to the law, and it is your duty to accept these instructions as to the law and to apply them to the facts as you find the facts to be.

Now, you are not to single out one instruction alone as stating the law, but must consider the instructions as a whole. Neither are you to be concerned with the wisdom of any rule of law I give you. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than stated here, just as it would be a violation of your sworn duty as triers of fact

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to base a verdict upon anything but the evidence.

Now, in the determination of the facts, you rely upon your own recollection of the evidence. What I may have said from time to time, or may say in this charge as to the facts -- and, for that matter, what counsel may have said during the trial or in their respective summations -- are not to be taken in place of your own recollection of the facts.

You have observed that throughout the trial I was called upon to make rulings on matters of law. I sustained some objections and overruled others. You are not to concern yourselves at all as to the reasons for my rulings. Please do not draw any inference from the fact that I may have sustained or overruled an objection. These involve purely matters of law. And if during the course of the trial a question was asked and an objection interposed which the Court sustained, you are to disregard the question. Similarly, if after a question had been asked and answered by the witness, the answer was stricken from the record, you are to disregard both the question and the answer in your deliberations.

I want to impress upon you that the evidence comes only from the witnesses on the stand, the admitted evidence and the exhibits. However, both direct examin-

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ations and cross-examination may be, and, of course, should be considered by you in your deliberations.

Now, before I give you any further instructions, I want to make a couple of things clear to you:

First, so that you will not be confused, you are advised that Fenestra is no longer a plaintiff in this case. Therefore, the two plaintiffs whose claims are before you are Textura and Mr. Powrie. You are to attach no importance to the fact that Fenestra is no longer a party in the suit.

Now, in the instructions which follow, I will often refer to Powrie and Textura collectively as plaintiffs. However, it is important for you to keep in mind that each plaintiff's right to recover must be considered separately.

Second, each defendant is entitled to individual consideration of the evidence as applied to it to determine whether that particular defendant is liable to any plaintiff. Plaintiffs contend that the defendants were engaged in one or more conspiracies. However, no defendant should be prejudiced in the minds of the jurors, nor shall you assume to infer that there was a conspiracy, merely because it has been named by plaintiffs with others as a defendant in this case.

Third, you will notice that one of the plain-

tiffs in all three of the defendants are corporations. For the purposes of this case, corporations are to be considered to have the same standing as persons. This case should be considered and decided by you as an action between persons of equal standing in the community. The law does not distinguish persons on the basis of wealth; all persons stand equal before the law, and are to be dealt with as equals in a court of justice. Therefore, those parties in this case which are corporations are entitled to the same fair and unprejudicial treatment that any individual would receive under like circumstances.

Now, in this connection, I wish to make another point. A corporation acts through its officers, directors and agents and may, through one of them or more, conspire with another corporation or with other individuals. Any act or statement of an officer, director or agent of a corporation which is done within the scope of his duties or authority you may consider to be an act or statement of the corporation itself. In order for a corporation to be held responsible for their acts or statements, it is not necessary that the corporation specifically authorize them to commit such acts or make such statements. It is enough if those acts were expressly authorized or apparently authorized. By apparently authorized, I mean that

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the act or statement is something which outsiders would normally and naturally assume was authorized by the corporation.

Fifth, you have heard some testimony in this case having to do with an alleged conspiracy to fix prices in the decorative fiber glass fabric field. The Court has dismissed that claim from the case on the ground that there was insufficient evidence of it to go to the jury. You are instructed to disregard that claim. I want to caution you, however, that no inference is to be drawn against plaintiffs or in favor of defendants from this fact.

I will come to the various claims.

As you know, Textura and Mr. Powrie, the plaintiffs, are seeking to recover money damages for injuries to business and property they allegedly sustained as a direct and proximate result of two alleged conspiracies to restrain trade under the Federal antitrust laws. It is plaintiffs' contention that the defendants -- Clark-Schwebel Fiber Glass Corporation, Burlington Industries, Inc. and J. P. Stevens -- and others not named as defendants conspired, first, to fix prices on industrial fiber glass fabrics sold by defendants to plaintiff Textura, Ltd. and its predecessor, Glass Fabrics, and, second, to put Textura

out of business by, among other things, coercing Textura into the settlement of an arbitration brought by defendant Clark-Schwebel, by withdrawing extended credit privileges, stopping deliveries and selling defective fabrics to Textura, and by circulating false information regarding plaintiffs Powrie and Textura.

Now, I mentioned before that these three companies and others, who are not named as defendants, are charged with being parties to this conspiracy. The persons and companies which are named as co-conspirators, but not as defendants in this action are L. F. Dommerich & Company, Inc., Louis Moskowitz, Owens-Corning Fiberglas Company, James Cann, and Sherwood Gumbiner.

Those are the claims that have been made by the plaintiffs. Defendants deny these allegations.

Now, each of the defendants has brought a counterclaim against Textura, Mr. Powrie and Mr. Grafstrom. Each defendant seeks to recover money damages from the three for injuries alleged sustained as a direct and proximate result of intentional misrepresentation allegedly made with respect to the financial condition of Textura and its ability to pay its bills. Textura, Mr. Powrie and Mr. Grafstrom each deny these allegations.

Plaintiffs Textura and Powrie, having made the

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claim that there was a conspiracy among defendants and others in violation of the antitrust laws, which proximately caused injury to it, must each prove its claim by a preponderance of the credible evidence.

The defendants, on the other hand, having claimed that Textura, Powrie and Grafstrom made misrepresentations regarding Textura's financial condition, which proximately caused injury to them, have the burden of proving this by a preponderance of the credible evidence.

This preponderance is determined by your weighing the credible and the convincing evidence tending to prove a given element of the claim, and the credible and convincing evidence tending to disprove it.

This expression, "a fair preponderance of the evidence," refers to the quality of the evidence, and not to the number of witnesses. It means that the evidence admitted by a party who has the burden of proof on any particular issue must be more persuasive and more convincing than that opposed to it.

You may say that a fact is proved by a fair preponderance when all the credible evidence tends to persuade you that the witness or witnesses are telling the truth. However, the fact that a witness' version of an occurrence is not contradicted by another does not compel

you to accept his testimony. Similarly, it is not required that a witness' testimony be corroborated by another witness. You must be satisfied that his version is, in fact, believable, credible, and trustworthy.

At this point, I think an illustration might be helpful in conveying the meaning of the phrase "a fair preponderance of the evidence."

In your deliberations in the jury room, envision that you have a scale beside you with the two sides of the scale, and as you review the evidence, believable and credible, which supports the plaintiff's case, you put it on what you call the plaintiff's side of the scale, and then, when you find evidence that is credible and believable and supports the defendant's side of the case, you put it on the defendant's side of the scale. When you have reviewed all the evidence, if the plaintiff's side of the scale is tilted or weighted in his favor by whatever degree, no matter how slight, then he has sustained his burden of proof. If the scales are in balance, if they are even, then he has not sustained his burden of proof by a fair preponderance of the evidence, and, obviously, if they are tilted or weighted in favor of the defendant, the plaintiff again has failed to sustain his burden of proof.

Of course, in addition to considering the facts,

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you may also consider and draw such inferences as reasonably flow from the facts as you find them. An inference, of course, is a logical, reasonable deduction from other facts in evidence, and an inference, when drawn, is itself evidence.

Now, the law recognizes two types of evidence which come from the witness stand, that is, direct and circumstantial evidence, both of which may be considered by you in reaching your determination.

Direct evidence is testimony by a witness as to what he saw or heard or discovered -- what he knows of his own knowledge -- something which comes to him directly by virtue of his own senses.

Just as facts may be proved by direct evidence, so, too, they may be proved by circumstantial evidence. In order to prove a fact by circumstancial evidence, there must be proof of some fact which, though true, does not itself directly establish the fact in dispute, but affords a reasonable inference of its existence. The fact or facts upon which it is sought to base an inference must be shown to your satisfaction, rather than left to conjecture, and when shown, it must appear that the inference drawn is the only one that can fairly and reasonably be drawn from the facts, and that any other explanation can be fairly

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and reasonably excluded.

At this point, I wish to instruct you that your decision in this case must be supported by the evidence produced in court, and no finding or decision must be arrived at through guess, speculation or conjecture.

With these general observations, we approach the specific issues in this case and the applicable law.

Now, I will first instruct you as to the law applicable to plaintiffs' claims. As I have already told you, plaintiffs have alleged that defendants violated the antitrust laws of the United States. The antitrust laws are intended to foster and preserve a system of free competitive enterprise, to preserve the fullest practicable competition in the marketplace, and to prevent the accomplishment of a monopoly in any business or industry.

Specifically, plaintiffs have alleged that defendants violated Section 1 of the Sherman Antitrust Act, 15 U.S.C., Section 1, which provides, in pertinent part, that:

"Every contract, combination . . . or conspiracy in restraint of trade or commerce is illegal."

Now, before turning to the issues which you must consider, I want to define a couple of the terms and phrases used in that section.

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A conspiracy is a combination of two or more persons -- or corporations -- by concerted action to accomplish some unlawful purpose by lawful means, or to accomplish some lawful purpose by unlawful means. There can be no conspiracy unless more than one person is involved. A conspiracy may be either express or implied. Once a conspiracy is proven, each member becomes, in the eyes of the law, the agent of every other member, and each member is charged with responsibility for the acts of all the other members in furtherance of the conspiracy, which acts the law assumes each member to have directed or authorized.

The phrase "trade or commerce" includes the weaving and sale of fiber glass fabrics by the defendants to the plaintiffs on credit or otherwise, so you need not concern yourself further with this aspect of the statute. Similarly, the requirement of the Antitrust Act that the "trade or commerce" be "among the several States" is satisfied by the interstate transportation of the fabrics by defendants to plaintiffs.

The purpose of Section 1 of the Sherman Antitrust Act is to protect the public and individuals from restraints on free competition, and in order for the plaintiffs to recover they must establish that the conspiracy engaged in by the defendants was one "in restraint of trade." It is

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not every conspiracy between parties which is prohibited by the antitrust laws, but only those which impose an unreasonable restraint upon commerce. An unreasonable restraint is one which unreasonably or unlawfully interferes with normal, full and free competition. A conspiracy is automatically considered to be an unreasonable restraint of trade if it results in the elimination of a business, or if the result is the fixing of prices at which two or more competitors sell their goods to customers.

In this action, plaintiffs allege conspiracies of both these types. Defendants have admitted that at one time they conspired to fix the price of industrial fiber glass fabrics. Plaintiffs have also put in evidence to establish that there was a conspiracy to put Textura out of the fiber glass fabrics business. If you find that defendants conspired to put Textura out of business, you need not concern yourself further with the question of whether this conspiracy was an unreasonable restraint of trade. The law presumes that such a conspiracy, as well as a conspiracy to fix prices, constitutes an unreasonable restraint of trade.

So, in order for plaintiff Textura to succeed on its claim, you must find by a preponderance of the evidence, first, that there was at least one conspiracy to

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do the things alleged by plaintiffs; second, that one or more of the defendants knowingly participated in the conspiracy; third, that the conspiracy was the direct and proximate cause of injury to plaintiffs; and, fourth, that plaintiffs have been damaged in an amount which is reasonably ascertainable.

Now, I will discuss each of these four elements in turn.

I have already defined the term "conspiracy" for you. How, then, are you to determine whether the existence of a conspiracy has proven. And here I am referring to the alleged conspiracy to drive Textura out of business. Because of their inherent secret nature, conspiracies are rarely proved by direct evidence, but, instead, are generally proved by what I have referred to as circumstantial evidence, that is, inferences to be drawn from the totality of defendants' conduct, acts, communications, associations, and contacts with each other and with plaintiffs which suggest to your mind, logically, a combination, a confederation, a coming together or a meeting of the minds upon a community of purpose or of design, and that in some way or manner, or through some contrivance, positively or tacitly, that defendants came to a mutual understanding to accomplish any one of the results suggested by plaintiffs.

Although a conspiracy may be established by circumstantial, rather than direct, evidence, no less weight is to be given because of the circumstantial nature of the proof required to establish it.

In order for plaintiffs to establish a conspiracy, whether by direct or circumstantial proof, you must always first make a determination as to the existence of those facts from which plaintiffs seek to have you draw an inference, where an issue of fact exists. Thus, as to all matters as to which plaintiff alleges one set of facts are true and defendants allege that a contrary set of facts are true, you must first find, upon all the evidence, that it is more likely that plaintiffs' allegations are true than it is that defendants' allegations are true, before you consider what inference is to be drawn from the facts.

Before a conspiracy can be said to have been proved by circumstantial evidence alone, it is necessary not only that you find by a preponderance of the credible evidence that plaintiffs' allegations of the facts are true, but also that the inferences which plaintiffs wish you to draw are reasonable and that no other equally reasonable inferences can be drawn from the same set of facts. If two equally reasonable inferences can be drawn from the circumstances proved By the evidence, one consist-

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ent with the existence of a conspiracy and the other inconsistent, you should not infer the existence of the conspiracy from such circumstances alone.

A conspiracy can be inferred in many ways. Now, what are some of the things which you may consider in deciding whether a conspiracy existed or whether the conduct of the defendants was the result of independent judgment?

Plaintiffs claim that the defendants acted similarly and uniformly so that, together with other evidence, a conspiracy may be inferred. If you find by a preponderance of the credible evidence that defendants acted similarly or uniformly in their dealings with plaintiffs, then you may consider that evidence in determining whether there was a conspiracy.

However, similar or uniform behavior does not necessarily establish the existence of a conspiracy. Parties may act similarly and yet their actions may be the result of independent judgment. Moreover, the antitrust laws do not prohibit one businessman from adopting a certain course of conduct merely because his competitor has already adopted the same or similar conduct. So long as a businessman's conduct is arrived at independently and is not the result of an agreement or understanding with his com-

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petitor or with others, then you may not infer the existence of a conspiracy. The fact that members of a conspiracy may not have acted similarly or uniformly, however, does not necessarily mean that there was no conspiracy. Members of a conspiracy need not act identically; their activities may be in different directions, so long as all of the activities are intended to contribute to a common end.

Now, there has been some evidence that there was an exchange of credit and customer information between some or all of the defendants and between the defendants and others. The exchange of information between the sellers of a product concerning the credit rating or standing of a common customer does not alone form a basis for an inference that a conspiracy in restraint of trade was formed. The preparation and exchange of such information is a normal and usual business practice. However, such exchange of information, if you find such an exchange did in fact occur, may be considered, along with other evidence, in determining whether a conspiracy existed.

Defendants claim that there was a legitimate business reason for defendants' acts. In considering whether defendants had good business reasons for acting as they did, you must, of course, consider only those facts actually known to defendants at the time they are alleged

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to have acted. You may also consider whether defendants' claim that they acted for good business reasons is advanced in good faith or whether those reasons were not the real reasons for taking such actions. If those reasons seem not to be advanced in good faith and if they appear to you not to be the real reasons for defendants' acts, these are circumstances from which you may, but need not necessarily, conclude that defendants acted as a result of a conspiracy. Now, if you find that defendants had good business reasons for acting as they did and that defendants are advancing those reasons in good faith, you may consider those reasons as tending to refute the inference that there was a conspiracy. However, if the overall evidence is sufficient to support an inference of conspiracy, the fact that a defendantant's activities may be explainable as a reasonable business decision will not justify the defendant's conduct or deprive its act of its illegal character.

Plaintiffs also claim that defendants had an anti competitive motive, that is, that based upon complaints of defendants' more substantial customers and based upon their own dealings with plaintiff, they wanted to put textura out of business. Plaintiff contends that from these motives it may be inferred that there was a conspiracy to drive Textura out of business. Now, if you find by a preponder

ance of the evidence that one or more of the defendants had such anti-competitive motives, you may consider that finding of fact in determining whether a conspiracy existed. However, these motives will not convert conduct which is otherwise lawful under the antitrust laws into unlawful behavior under the antitrust laws.

Now, in support of its claim that defendants' motives were anti-competitive, plaintiff also claims that the actions which defendants took were contrary defendants' own self-interests. If you find by a preponderance of the credible evidence that defendants acted in apparent contradiction of their own self-interest, you may, but need not necessarily, infer that there was a conspiracy.

Plaintiffs have charged that there were two conspiracies -- one to fix prices in industrial fiber glass fabrics and one to put textura out of business. Defendants have admitted that prices were fixed on industrial fabrics at one time. Although they have admitted that they were parties to the price-fixing conspiracy, however, you may not infer from that admission that defendants conspired to drive Textura out of business.

Now, if you conclude that a conspiracy existed, you must then determine wehether plaintiffs have proven by a preponderance of the evidence that the particular defend-

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ant you are considering knowingly participated in a plan with the intent to acccomplish an unlawful purpose.

Now, what is meant by the phrase "knowingly participated"? Knowledge is a matter of inference from facts proved. An act is knowingly done if it is done voluntarily and intentionally, and not because of mistake, accident or other innocent reason. Intent is the purpose or aim or state of mind with which one acts. A person is usually held to intend to do everything he knowingly does.

Now, it is not necessary that the particular defendant you are considering be fully informed as to the details of the scope of the conspiracy in order to justify any inference of knowledge and intent on his part. You must merely find by a preponderance of the evidence that the particular defendant was aware of at least some of the basic aims and purposes of the conspiracy.

But knowledge without participation is not enough. Now, on the matter of participation, I want to caution you that mere association with one or more of the conspirators does not make one a member of the conspiracy. But once you find knowing participation, the extent of participation has no bearing on liability. Even if his participaion is more limited than that of his co-conspirators, a person or corporation who is found to be

a co-conspirator is equally liable.

In determining whether the particular defendant whose liability you are considering is a member of a conspiracy, you may not consider the statements of another co-defendant or alleged co-conspirator, unless and until the defendant's membership in the conspiracy is established by independent proof received as to it, that is, by evidence received as to it of its own acts, its own statements, or its own conduct and the reasonable inferences to be drawn therefrom.

You are further instructed that when a person is shown to have entered a conspiracy in restraint of trade, it will not be assumed that it was abandoned without clear proof to the contrary.

You are also instructed that, if you should find that a conspiracy existed and that a particular defendant was a knowing participant in it, you need not find that all of the participants formed or joined the conspiracy simultaneously. A person may be found to have joined a combination or conspiracy which is already in existence. Such a person, by knowingly becoming a member to the combination or conspiracy becomes responsible in law for those acts of the members of the conspiracy which were performed prior to the time the new participant joined it.

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Now, I just want to caution you that there can be no conspiracy unless more than one person - corporation is involved. On the other hand, you need not find that all three of the defendants were engaged in the conspiracy in order to find for plaintiffs. It is sufficient if any one of the defendants was engaged in a conspiracy with any other defendant or even a non-defendant co-conspirator.

When people enter into a conspiracy to accomplish an unlawful end, they become agents for one another in carrying out the conspiracy. Hence, the acts or declarations of one in the course of the conspiracy and in furtherance of the common purpose are deemed to be the acts of all, and all are responsible for such acts.

Accordingly, if you find in accordance with my instructions, that the alleged conspiracy existed and that any one or all of the defendants were participants in it, then acts done and declarations made in furtherance of the conspiracy by the persons found by you to have been members of the conspiracy -- whether or not those persons are named as defendants -- may be considered against any defendant whom you find was a member, even though such acts or declarations were made in the absence and without the knowledge of such defendant.

Now, if you conclude that there was a conspiracy

and that one or more of the defendants was a knowing member of the conspiracy, you must find by a preponderance of the evidence that the object of the conspiracy was to restrain trade. Plaintiffs claim that there were two objects, one, to fix prices on industrial fabrics sold to Textura, and its predecessor, Glass Fabrics, and another, to force Textura and Powrie out of the fiber glass fabric business.

With respect to plaintiffs' allegation that one of the objects of the conspiracy was to fix prices on industrial fiber glass fabrics, the defendants have admitted that prices were fixed on industrial fabrics at one time. Now, a conspiracy to fix prices is, as a matter of law, a conspiracy which is unreasonably in restraint of trade. Defendants still contest, however, plaintiffs' charge that defendants' price-fixing activities in industrial fiber glass proximately caused any injury to plaintiffs. I will instruct you as to that element of the case a little later.

We turn, then, to the other alleged object of the conspiracy -- to drive Textura out of business. Now, I instruct you that as a matter of law a conspiracy to eliminate a business is a restraint of trade and is unlawful under Section 1 of the Sherman Antitrust Act.

Plaintiffs have alleged that this object was

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furthered in a number of ways. For example, it is claimed that the defendants conspired, beginning in March, 1966, to take various restrictive acts against plaintiff's account, including refusal to process orders, withdrawal of extended credit terms, and holding up of shipments; that defendants and the alleged co-conspirators Dommerich or Moskowitz conspired to circulate false information with a view toward inducing others to restrict Textura's credit, demand guarantees and otherwise refuse to deal with Textura; that all three defendants and Dommerich conspired to induce Dommerich to withhold moneys and to cancel its factoring contract with Textura; and that defendants conspired to force plaintiffs to settle a punitive arbitration proceeding with the defendant Clark-Schwebel.

It is not necessary for plaintiff to establish that the defendants, or any one of them, carried out this conspiracy by all of the means that plaintiff allege were used. It is only necessary that plaintiffs prove that there was a conspiracy, that this conspiracy was furthered by at least one means, and that the means used caused damage to the plaintiffs.

I also want to caution you that the mere fact that any one or all of the defendants may have done one of these acts is not sufficient to find in favor of plaintiff.

Unless you find that any one of these acts was done pursuant to or in furtherance of the conspiracy, you may not find in favor of the plaintiff.

For example, a business may, for good reasons or bad reasons, withdraw extended credit privileges, stop deliveries or sell defective goods, so long as its decision to do so is based upon its independent judgment. Similarly, the exchange of information among sellers regarding a common customer is not prohibited by Section of the Sherman Antitrust Act if the exchange is the result of independent judgment and not the result of a conspiracy.

However, an act, harmless when done by one, may become a wrong when done in concert by two or more. A series of acts, each of which may be innocent in itself, may be wrongful if the direct result is to carry into effect a conspiracy. The gist of Section 1 of the Sherman Antitrust Act is agreement. Thus, if any one of the means mentioned was done in furtherance of or pursuant to a conspiracy, they become unlawful.

In this regard, I want to mention one more thing. The fact that the plaintiffs may have been in breach of contract with one or more of the defendants will not avail the defendants as a defense if you find that any one of them or all of them conspired to violate Section

1 of the Antitrust Act.

If you find that defendants, or any one of them, conspired to violate Section 1 of the Sherman Antitrust Act, you must next consider whether either or both plaintiffs have established by a preponderance of the evidence that the violation directly and proximately caused loss and damage to their business or property. The law requires proof of a causal connection between ny antitrust violation and injury. An injury is proximately caused by an act whenever it appears by a preponderance of the evidence that it played a substantial or material part in bringing about or actually causing the injury or damage, that is, there must be a direct causal connection or a finding that the claimed injury was a reasonably probable consequence of the act. There may be more than one proximate cause of an event.

If, after considering all of the evidence, you should determine that the plaintiffs did sustain injury, but that such injury was occasioned and caused by matters separate and distinct and apart from any alleged unlawful conduct by any one or all of the defendants, then your verdict would have to be in favor of the defendant or defendants whose liability you are considering.

Now, before I discuss the issue of damages, I would like to review for you the elements which each of the plaintiffs must establish to succeed on it or his claim.

You must find by a prepondernace of the evidence, as I have defined that phrase to you, that, first, there was at least one conspiracy to do the things alleged by plaintifs.

Second, that one or more of the defendants knowingly participated in the conspiracy.

Third, that the conspiracy was the direct and proximate cause of injury to the particular plaintiffs' business or profit.

The fourth element which I will now discuss, although I think we might take a recess, as my throat is getting awfully dry, I will discuss the matter of damages after a short recess.

(Recess.)

(In open court; jury present.)

THE COURT: We now come to the matter of damages. The fact I am instructing you on this issue is not to be taken by any of you as any indication that the court believes that either plaintiff is or is not entitled to recover damages.

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If you find the other essential elements for recover, or any of them, have not been established by a prepondernace of the credible evidence, then you are instructed to disregard entirely the following instructions. On the other hand, if you find that all of the other essential elements have been established by a preponderance of the credible evidence with respect to any one or all of the defendants, then you must consider and apply the following instructions:

Under the law there is a clear distinction between what is required to establish the fact that the plaintiff has sustained some damage and the measure of proof to enable you to fix the amount of the damage. The fact of injury must first be established before you can estimate the amount of damage.

The burden on plaintiff in proving the fact of injury is stringent. The fact of the injury caused by the violation must be established by plaintiff with reasonable probability.

If you find that the fact of injury has not been established by either plaintiff with reasonable probability you are instructed to find in favor of the defendants against that plaintiff. If, on the other hand, you find that the fact of injury has been

established, then you may consider the amount of damages which either or both plaintiffs are entitled to cover.

I want to say a few general words about damages. A plaintiff is entitled to recover in damates that amount of money which will fairly and reasonably compensate him for all of the actual damage done to his business and property by the illegal act of a defendant, the idea being that the plaintiff should be placed in as good a position as he would have been in had the defendant not injured him.

The burden of establishing the extent and amount of damages in this case is on each of the plaintiffs. However, the burden of proof will be satisfied if the preponderance of the credible evidence produced at trial affords a reasonable basis for computing the probable amount of damages. If you find no such basis has been shown by a preponderance of the credible evidence for determining the amount of damages actually sustained, no recovery of damages in any amount may be awarded and your verdict must be for the defendant.

On the other hand, it is not necessary to prove the amount of damages with precise mathematical accuracy. The jury is permitted to determine the

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amount of damages by estimate or approximation, provided, of course, a reasonable basis for the estimate or approximation is shown by the evidence and the evidence reasonably establishes the probable amount of damage actually sustained.

You must be cautioned, however, that you must not engage in conjecture, guesswork or speculation in arriving at the amount of damages.

In this connection, you are instructed that if the antitrust violations of the defendants or any one of them, has rendered difficult ascertainment of the precise amount of damages suffered, the defendants are not absolved from liability. A defendant may not benefit of take advantage of his wrong by claiming that the damages to plaintiffs are too uncertain if there is a sufficient basis for approximating such damages.

Each of the plaintiffs has made separate claims for damages. I will say a few words about each of these claims.

First we come to lost operating profits to Textura. The first element of damage which plaintiff Textura seeks to recover is the amount of net profits which it would have made from the time defendants'

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conspiracy to force Textura out of business began in March, 1966 until the time Textura ceased doing business in December of 1966.

Now, the law is that one who seeks to recover for loss of the anticipated net profits of an established business should reasonably make proof of the expenses and income of the business for a reasonable length of time before as well as during the period of claimed injury. One who seeks to recover for the loss of such profits without making reasonable proof of the expenses and income of that business for a reasonable length of time before as well as during the claimed injury, or proof of facts of equivalent import, can hardly be said to sustain a claim for loss of profits.

However, you are also instructed that the amount of lost profits need not necessarily be limited to the amount of net profits actually realized by Textura prior to the conspiratorial period.

I must emphasize to you that a business may only be awarded damages for its net profits. The net profits of the business, as distinguished from its gross profits, are computed by subtracting the costs and expenses of doing business from the gross revenues

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received by the business. In computing the amount of damages for lost profits, therefore, you must first determine what the gross revenues of Textura would reasonably have been during that period in the absence of the illegal restraints.

Then you must subtract from that amount the cost and expenses of doing business. Inmaking this determination you must look to all of the facts and circumstances in the record on this subject, including all of the testimony and exhibits.

Next, we come to lost profits to Textura after it ceased doing business. The second claim that Textura makes is for loss of net profits it would have received after it ceased doing business but for the alleged conspiracy to put it out of business. That category of lost net profits is determined by projecting the amount of net profits which Textura would have made from the date it ceased doing business until a reasonable point in the future.

In making the determination of lost net profits for this period of time you are bound by the same rules I have previously given you on the question of damages. In determining the number of years which is a reasonable period of time for projecting

future net profits there is no established rule. However, you may in determining this period consider the length of time Textura was in business prior to the time the conspiracy to force it out of business was alleged to have commenced, and you may also consider the stability of Textura as a business concern during that period.

The next matter of damages: Textura is also seeking to recover lost profits as a result of the price-fixing conspiracy in industrial fabrics. As you recall, I told you earlier that defendants have admitted that they were engaged in a price-fixing conspiracy of industrial fiber glass fabrics between 1956 and late 1962. But before you can consider whether Textura is entitled to damages from this conspiracy you must first consider whether plaintiff Textura has established by a preponderance of the evidence:

First, that Textura and/or its predecessor, Glass Fabrics, was in fact damaged;

Second, whether the injury was a direct and proximate result of the conspiracy; and

Third, whether there is a reasonable basis for estimating the amount of damages caused there-

by.

Only if you find that Textura has established each of these elements by a preponderance of the evidence may you then consider what amount Textura is entitled to recover on its own behalf and on behalf of Glass Fabrics as a result of this conspiracy.

Then Textura will be entirled to recover the difference between the amounts actually realized by Textura and its predecessor Glass Fabrics and the amounts they would have realized but for the price-fixing conspiracy.

Additionally, and apart from whether or not Textura would have made net profits, Textura would be entitled to recover any additional expenses it incurred as a result of the conspiracy. For example, increased cost of goods to the price-fixing conspiracy.

I now come to Mr. Powrie's claim for damages. Before I discuss what damates Mr. Powrie is claiming I want to say a few general words about the issue of his right or standing to recover damages.

Under the antitrust laws those harmed incidentally by an antitrust violation may not recover from one who is found to have violated those laws. Only one who is a direct target can recover. In other

words, while every violation of the antitrust laws creates injury throughout the whole economy, some who are injured are direct targets while others are merely incidental targets. In that regard I instruct you that as a matter of law a person who suffers some injury as a result of an antitrust violation in his capacity as a stockholder or a creditor of a corporation is not a direct target. However, in certain instances an employee or a guarantor of a corporation may be a target of the violation and may recover damages for injuries to his business and property.

So one of the issues you will have to decide is whether Mr. Powrie as an employee and as a guarantor of Textura was a direct target of the alleged conspiracy to force Textura out of business. In making this determination, I instruct you to take the following facts as true and established, and those facts, first, are that Mr. Powrie never made or attempted to make purchases from any of the defendants. Secondly, that he never sought any extensions of credit from the defendants, and that Mr. Powrie as a shareholder and officer was a shareholder, an officer, an employee, and a creditor and a customer of Textura.

Now, if on the basis of these and the other

evidence you do not find that Mr. Powrie was a direct target of the conspiracy -- that is, if you find that Mr. Powrie was only incidentally harmed -- then you may not award any damages to Mr. Powrie.

The first element of damages sought by Mr. Powrie is the salary which he lost as a result of the conspiracy to force Textura, of which he was president, out of business. If you find, in accordance with my instructions, that Mr. Powrie was a direct target of the conspiracy, then you may award him damages in the amount of the salary he would otherwise have received for a reasonable period of time had Textura not been forced to cease operations as a result of that conspiracy.

The law provides, however, that a plaintiff has a duty to mitigate his damages. That is, a plaintiff must make all reasonable efforts to avoid or to minimize its damages. He may not simply sit back and let damages accumulate.

Thus, Mr. Powrie can recover only the difference between what he would have earned with Textura and what he actually earned or by reasonable efforts could have earned in substitute employment after Textura went out of business.

In determining whether Mr. Powrie has dis-

charged his duty to mitigate damages, you may consider whether a reasonable man in his position would have acted as he did. If you find that Mr. Powrie did obtain other employment, then at a minimum you must deduct from his salary claim the compensation which he derived from the other employment. If you find that by using reasonable efforts Powrie could have earned more than what he actually did earn, then you have to deduct that amount which he could have earned by making reasonable efforts.

If you find that Mr. Powrie either did or by reasonable efforts could have earned as much or more in other employment than he would have earned with Textura, then you will award him nothing on his claim.

The second element of damage which Mr. Powrie claims is the loss he incurred with respect to guaranteed payments made to third parties which Textura would have repaid to him if Textura had not been forced to terminate its operation.

Once again you must first find that Mr. Powrie was a target of the conspiracy to force Textura out of business. Only if you find that he was a target of the conpsiracy may you consider this element of damages.

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I want to emphasize that you are permitted to award either Textura or Mr. Powrie or both damages for any one or all or none of the claims for damages which I have just discussed.

I also want to emphasize that you must consider the liability of the three defendants separately. That if you find for both plaintiffs or any one of them, your verdict will be a verdict for a single lump sum against all of the defendants which you find are liable for either or both of the alleged conspiracies.

I will give you a form to take into the jury room which I think will make this clearer to you.

After you have determined these issues which I have discussed with you of the plaintiffs' claims, and regardless of what determination you reach with respect to the plaintiffs' claims, you must then determine the counterclaims of each of the defendants against the plaintiffs Textura and Mr. Powrie and Mr. Grafstrom.

Each of the defendants alleges it was damaged by acts of fraud and deceit committed by one of the three litihants whom I mentioned, Textura, Mr. Powrie and Mr. Grafstrom.

Specifically, the fraud and deceit alleged

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to have been committed is false representation and misrepresentation or concealment of facts in connection with the financial projections, the financial condition, the solvency and the stability of Textura, Powrie and Grafstrom.

In order for you to find that fraud and deceipt were committed the defendants must establish by a preponderance of the evidence each of the following five elements.

First, that a material representation of fact was made to each defendant, that the representation made was false, that the representation was made with the intent to deceive the defendant, ant the defendant believed and justifiably relied upon the representation, and was induced thereby to extend credit or sell fiber glass fabrics, and, finally, that as a proximate result of reliance upon the representation the particular defendant you are considering sustained pecuniary loss.

Each defendant must establish each of these five elements by a preponderance of the evidence in order for you to return a verdict in favor of such defendant. In the event a defendant fails to prove each element by a preponderance of the evidence, you may not render a verdict in favor of such defend-

ant.

In addition, a defendant is only entitled to a verdict against the individual or corporation which committed the fraud or deceit or which made the representation to the particular defendant.

I will charge you specifically on each of the five elements of fraud and deceit which I have just mentioned.

The first element which each defendant must establish to recover is that one of the plaintiffs or Grafstrom made a material representation of fact to a particular defendant with respect to the financial matters which I previously mentioned. The representation must be one of fact. A promise or a prophecy, prediction or belief or opinion as to a matter is not a factual representation and cannot constitute the basis for a claim of fraud and deceit.

In addition, the representation of fact must be material. A fact is material if it concerns a matter to which a reasonable man would attach importance in making a decision with respect to the transaction in question, or if the maker of the representation knows the recipient of the representation is likely to regard the fact as important. A false representation

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may also be ir the form of a misleading statement as to one's state of mind or intention.

If you determine that a material factual representation was made to a defendant, you must then consider whether such representation was true or false. If you find it was true you should not consider that representation forther. If it has been established that the representation was false, a second element of fraud and deceit have been satisfied and you must then determine whether the representation was made with the intent to deceive, which is the third element.

Now, a false representation is made with intent to deceive if it is made with knowledge that it is false or, if not known to be false, was made recklessly. A statement is made recklessly if made with the pretense that it was true but without knowledge as to whether it was true or false. The word "recklessly" also means that the statement is made with indifference to consequences. If a person makes a representation without knowing whether it is true or not, or makes it without regard to its truth or falsity or to its possible consequences, he may be found to have made the representation recklessly. However,

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if there is a reasonable basis for a belief in the truth of the statement there can be no intent to deceive.

If you find that a materially false representation was made to a defendant with intent to deceive, you must then determine whether it has been established that the particular defendant believed and justifiably relied on the representation and was induced by such representation to extend credit or sell fiber glass fabrics.

Whether the person to whom a representation is made is justified in relying on it generally depends upon whether the fact represented is one that a reasonable man would consider important in reaching a decision in the transaction in question, but even though it is not such a fact, reliance may be justified if the person making the representation knows the person to whom it is made considers it important and relies upon it.

If you find the particular defendant did not believe or should not have believed the representation made to it no fraud or deceit will exist.

Finally, if the particular defendant was not induced to extend credit or to sell fiber glass

fabrics as a result of the representation, as for example if the extension of credit or the sales of fiber glass fabrics was motivated by considerations other than the representation, you may not find for that defendant.

If with respect to any particular defendant you have found that the above four elements have been established by a preponderance of the evidence, you may nonetheless only render a verdict for such defendant if the fifth element of fraud and deceit is proven, that such defendant suffered pecuniary loss as a direct and proximate result of relying on the representation.

If you determine that a defendant did suffer pecuniary loss as a direct and proximate result of relying on the representation, all five elements would be satisfied and you may render a verdict in behalf of the particular defendant against the individual or corporation which made the representation.

As to the amount of damages which any or all of the defendants would be entitled to receive on their counterclaims, the court has received a stipulation by the parties as to that amount.

Is that correct?

MR. BREINDEL: No, it is not, your Honor.

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MR. TOPKIS: The facts are stipulated, your Honor. It hasn't been reduced to writing, but we have it if your Honor wishes.

MR. BRENDEL: We have stipulated as to the amount owing at the time to each defendant at the time Textura went out of business. We did not stipulate that that was the amount of damages in the event the other elements are found.

MR. TOPKIS: That's correct. The balances owing. If your Honor wishes then, I have them here.

THE COURT: Very well. I will discuss that with counsel. I will conclude the charge, because I was under the understanding that the amount in this case was not disputed.

I won't delay deliberations on that particular item.

At this point you may be asking yourself how you evaluate the testimony of the witnesses. Well, you use your everyday common sense. You have seen the witnesses, you have heard the testimony, and observed the manner of giving testimony.

How did the witness impress you? Did the witness appear to be truthful, candid and fair? Did he appear to be forthright?

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You may take into account the interest of a witness or what stake a witness has in the outcome of the trial. An interested witness, however, is not necessarily unworthy of belief, but his interest is a fact which you must take into account in determining the weight and credibility to be given to his testimony.

The fact that one is an interested witness doesn't mean that he is incapable of telling a truthful version of an occurrence.

You must decide whether any particular witness is telling the truth. If you believe that a witness has testified falsely as to any particular fact you may disregard his testimony altogether or you may accept such portion of it as you believe to be worthy of belief.

Inconsistencies or discrepancies in the testimony of a witness or between the testimony of different witnesses may or may not cause you to discredit or disbelieve such testimony. In weighing the effect of a discrepancy consider whether it pertains to a matter of importance or an unimportant detail, whether the discrepancy results from innocent error or wilful falsehood.

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The credibility of a witness may be attacked by introducing evidence that on some former occasion he made a statement or acted in a manner inconsistent with his testimony in this case on a matter material or related to the issue.

Evidence of this kind may be considered by you in connection with all the other facts and circumstance in evidence in deciding the weight to be given to the testimony of that witness.

What to accept or what to reject as credible evidence is for you to determine, but you musn't go outside of the evidence to speculate as to the facts.

Just a word about expert witnesses. The rules of evidence ordinarily don't permit a witness to testify as to his opinions or conclusions, but an expert witness is an exception to this rule. Such a witness may be permitted to state his opinion as to a matter in which he is versed and which is material to the case. He may also state the reasons for such an opinion.

Now, how do you evaluate the testimony of an expert witness? Well, the same way you decided whether to believe a lay witness. Has the expert witness impressed you. Did his judgment on professional

matters or the subject on which he presumed to speak with authority carry the evidence of learning, knowledge and competence? Did his judgment appear sound and convincing? Are you satisfied he gave you a fair, unbiased and accurate opinion? If so, act accordingly. But remember always it is the quality of the evidence that counts.

In so far as the testimony of an expert witness is based on personal observation of particular facts, it is to be considered by you the same as that of any other witness. However, the opinions of experts based on hypothetical assumptions of fact do not tend to prove the assumed facts upon which the opinions are based. The actual facts must be found by you from the basic evidence itself, and not from the assumptions of fact adopted by expert witnesses in forming opinions or in preparing summaries, computations, or other exhibits.

The jury is not bound to find facts according to expert testimony but such testimony should be considered in connection with all of the other evidence in the case.

In this case we have had the testimony of absent witnesses, which was read to you by way of

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depositions. Such testimony is entitled to the same consideration and the same judgment on your part with reference to its weight as is the testimony of witnesses who have confronted you from the witness stand.

In conclusion, your duty is to decide the issues in this case fairly and impartially. You decide the case without bias, sympathy or prejudice, and you decide it solely and only as I have told you at the very start of the trial, on the evidence, which means the sworn testimony presented to you and such documentary exhibits as have been received in evidence.

Your recollection of the evidence, not what I or counsel have said, should control and govern your decision. Counsel's arguments in summation are not to be taken as evidence. Their recollection of the evidence just as my recollection of the evidence does not control. It is your recollection that controls.

When you enter the jury room to commence your deliberations, remember that each juror is entitled to his or her own opinion, but you should exchange views with your fellow jurors. That is the very purpose of jury deliberation. Jurors are to discuss

and consider the evidence, listen to the arguments of their fellow jurors, present their individual views, consult with one another, and reach an agreement based solely and wholly on the evidence that has been adduced.

Each of you should do so, however, without violence to your own individual judgment. If after carefully considering the evidence and the arguments of your fellow jurors you entertain a conscientious vies that differs from the others, you are not to yield your conviction simply because you are outnumbered or outweighed.

If,on the other hand, you are persuaded that the opposite point of view should prevail, there is no reason why you should not change your mind.

In any event, your final vote must be in accordance with your conscientious judgment that this is what is called for by the evidence and those instructions of the law.

I am going to give you a form, as I mentioned earlier, containing questions to be answered in arriving at your verdict. You are to fill in those answers where appropriate. In answering these ques-

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tions you will be deciding, first, Textura's and Mr. Powrie's claims for damages resulting from the alleged conspiracy to force them out of business, and Textura's claim on behalf of itself and Glass Fabrics for damages resulting from the conspiracy to fix prices on industrial fiber glass fabrics, and, thirdly, the defendants' claims against Textura and Mr. Powrie and Mr. Grafstrom for injury resulting from alleged material misrepresentations.

Therefore, before you reach the matter of the defendants counterclaims, there are claims against Textura and Powrie and Grafstrom, I will try to straighten out the matter of damages, and you will not reach damages when you consider that particular counterclaim.

There are six members on the jury, and any verdict you reach must be unanimous. If you require any of the exhibits, just send out a note through your foreman and they will be delivered to you. If you with to have any of the testimony or any part of my charge read to you, send out a note and that will be done.

If you find that anything I have said to you requires further explanation, send out a note

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stating the difficulty and I will attempt to clarify it.

Your oath sums up your duty, and that is without fear or favor to any man you will well and truly try the issues between the plaintiffs and the defendants based solely upon the evidence and the court's instructions as to the law.

It is important to the plaintiffs; it is important to the defendants.

I will excuse the jury for a few minutes.

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(In the robing room.)

THE COURT: The plaintiffs will put their exceptions on the record.

MR. BREINDEL: In connection with the charge as to the fact of damage, I believe your Honor stated that the burden is stringent. We object to that on the grounds that the burden is the same as it is elsewhere in the civil case, it should be a preponderance of evidence, not stringent. So we take exception to that.

THE COURT: Okay. It stands, though.

MR. BREINDEL: In connection with the charges for damages with respect to Mr. Powrie, we take exception to the charge with respect to mitigation of damages. It is plaintiffs' position that the defendants have the burden of proving by a preponderance of the credible evidence that Powrie failed to mitigate damages, and that was not charged to the jury.

THE COURT: Those are the only two?

MR. BREINDEL: Yes, your Honor. We have one to the interrogatory, if you want me to hold off on that.

THE COURT: You people can't make up your mind. These have been done about five times.

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MR. BREINDEL: It's the same one we had last night, your Honor, that the counterclaim doesn't refer to reliance. I think all the elements are there except reliance. That is our objection to it.

THE COURT: It is the last sheet. I am not going to hold it up. I will just take the last sheet off and tell them that since that deals with the counterclaims, that they will receive a substitute sheet when we can straighten out this matter of damages.

MR. TOPKIS: That's okay, although I adopt the figures on the balances owing by Textura. That can be handled very easily, if you want to.

THE COURT: It is in evidence.

MR. TOPKIS: The figures have been [illegible]icated to the jury orally. I don't think there is a document.

MR. BURGESS: They were 17, 17 and 32, I think.

THE COURT: No, 16, 33 and 17.

MR. TOPKIS: We are certainly content to round them rather than fool around.

THE COURT: What I will do is I will charge them that the balances -- that there is no

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dispute but that the balances owing by Textura to Burlington, Clark-Schwebel and J. P. Stevens were in that amount.

MR. TOPKIS: Fine.

THE COURT: But I think I still have to -- they were certainly very carefully charged on the matter of reliance in the charge.

MR. BREINDEL: I agree with that, your Honor. Being that all the other elements have been carefully charged, reliance should be. A jury might draw some inference from that.

MR. TOPKIS: If your Honor wants to pen in which was relied on by that defendant I will have no objection, at the end of question 1.

MR. BREINDEL: Okay.

THE COURT: We will do that over.

When I give them the extra sheet I can give them that sheet.

MR. BREINDEL: It is my understanding those figures represent the amounts both sides agree were owing.

THE COURT: That's right. That is how I am going to define it.

MR. BREINDEL: But not that those are the

damages.

THE COURT: I will say that they may consider that these amounts were owing in reaching a determination of damages.

MR. TOPKIS: May I go ahead, your Honor?

THE COURT: Yes.

MR. TOPKIS: First, it is our view, your Honor, that you charged that it is alleged that there is a conspiracy participated in by the three defendants and Menardi, Gumbiner, Dommerich, Moskowitz and Owens-Corning Fiberglas.

It had been my understanding that you had ruled out, that you had found, that there was no evidence supporting the allegation as to any of the nondefendant co-conspirators. Specifically, on two occasions your Honor refused to allow out-of-court declarations on the ground that there was no proof. I am referring to Gumbiner and Dommerich, and I don't think there is any more as to the others.

That being so, I would say that your Honor's charge erred in submitting that issue to the jury. They should be instructed, it would seem to me, they may consider whether there is a conspiracy participated in by the three defendants and nobody else, and that only

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if they find that not one but two defendants participated in that conspiracy may they answer the first question put to them in the affirmative.

That problem goes right through the charge, because your Honor regularly charged that one defendant could be found to be a conspirator, and it is our position that the charge should be that two or more defendants must be found to have participated in the conspiracy since there is no evidence as to any other co-conspirator.

That is our first exception.

THE COURT: I don't think I ruled on everybody there.

MR. TOPKIS: No, I don't suggest that your Honor did.

THE COURT: I didn't on Owens-Corning.

MR. TOPKIS: There was no occasion to. But the only two occasions you had an opportunity to you ruled in our favor.

MR. BURGESS: I believe those rulings were confined to Gumbiner.

MR. TOPKIS: Gumbiner and Dommerich.

This a somewhat related point, but your Honor said you would not give the charge tendered by

plaintiffs at page 34 of their proposed charges with reference to a conspiracy to give false information to Dommerich since there was no evidence on that point, yet you did charge the jury that there was a contention made as to such a conspiracy. That is an unrelated point. The critical point is this business of whether they can find that one defendant conspired. It is our position that they cannot.

THE COURT: I don't know quite how to correct it. Well, it's on the record. The exception is on the record.

MR. TOPKIS: Very well, your Honor.

At one point -- let me put it this way: at various points your Honor spoke of two conspiracies being alleged, one to fix prices and another to drive Textura out of business, but at another point, or on on one occasion, your Honor spoke of one conspiracy having two objects. I wouldn't be at all surprised if this was a slip of the tongue or something, but it was as though there were one conspiracy, the two objects of which were to fix prices and to drive Textura out of business.

THE COURT: No, the means.

MR.TOPKIS: Objects or means. I don't

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believe it's ever been alleged there was just one conspiracy.

THE COURT: I don't believe I stated that. It seems to me I charged restraint and there were two means, by price-fixing and driving Textura our of business.

MR. TOPKIS: It is our position that conspiracy was not alleged, your Honor. The only allegation by plaintiffs is of two separate conspiracies: one,to fix prices, and, two, to drive Textura out of business, and the two conspiracies have nothing to do with each other. That had been my understanding of plaintiffs' position all along.

THE COURT: I think you will find two separate conspiracies are mentioned. But, at any rate, your contention is noted.

MR. TOPKIS: Next, your Honor charged that interchange of credit information may be considered in determining whether there was a conspiracy. We except to that.

THE COURT: I also said it was perfectly lawful.

MR. TOPKIS: Yes, I appreciate your Honor did. We except to that.

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Next, you charged that action contrary to self-interest may be considered as pointing toward a conspiracy, but I believe your Honor did not charge that the fact that acts are consistent with self-interest may be considered as negative.

THE COURT: I am sure we had that in.

MR. TOPKIS: I listened as well as I could.

THE COURT: I will just have to check.

MR. TOPKIS: Next, your Honor spoke in passing, in discussing Mr. Powrie's claim, that they might consider his claim as a guarantor or his losses in connection with loans to Textura, yet your Honor --

THE COURT: If he was a target. Not loans, only as a guarantor.

MR. TOPKIS: Your Honor told us yesterday that you would not charge the charge requested by plaintiffs at page 39 of their requests to charge, thus ruling out of the case Powrie's alleged losses as a guarantr.

Shall I go on, your Honor?

THE COURT: Yes.

MR. TOPKIS: This is just for the record, your Honor. Consistent with our earlier position, we would take exception to your not charging that

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damages will be trebled and that the jury may consider this in weighing the interest of plaintiffs' witnesses.

Next, we would ask you to submit to the jury rather than decide as a matter of law the issue of whether Textura succeeded to Glass Fabrics' claims under the antitrust laws.

THE COURT: I made that finding myself.

MR. TOPKIS: I appreciate that. I just want to make our record exception to it.

THE COURT: Fine.

MR. TOPKIS: Finally, this is the position I stated yesterday, and I don't want to labor it, but I would just note on the record our suggestion that question 2 of the counterclaim questionnaire calling on the jury to specify the false representations is inappropriate.

THE COURT: That is noted.

MR. TOPKIS: Finally, your Honor did not --

MR. BREINDEL: Is there a ruling on the last one?

THE COURT: I am going to leave it in as is.

MR. TOPKIS: Your Honor did not rule on

punitive damages and I take exception to that.

MR. MC CANNEY: I have one exception, to submitting the question of whether Powrie was a target to the jury. I believe that is a question of law.

THE COURT: Anything else?

MR. HARDISON: Not from me, your Honor. I join the others.

MR. BREINDEL: I would join in Mr. McCanney's statement in saying that is a question of law and it's been decided by Judge Conner as the law of the case, that's a target under the facts alleged in the complaint.

THE COURT: I think you are adding something to Judge Conner's opinion that wasn't in it, because the clear intimation was that he might [illegible] therefore he wasn't going to, without some proof, make any such finding. That's what's happening here. That's why we are here.

MR. TOPKIS: Thank you, your Honor.

(In open court; jury present.)

THE COURT: Mrs. Bauman, I am going to let you go because I can only send six into the jury room, but I want to thank you very much. You are excused,

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and it's been nice having you.

(Alternate juror excused.)

THE COURT: I have the for m that I mentioned for you to take into the jury room. There will be a fourth page, but, as I mentioned, the matter of damages in connection with the counterclaim there seesm to be a little confusion about it and I will send that additional sheet in to you or I will instruct you on the matter of damages so far as the counterclaims are concerned and give you an additional sheet, but this will permit you to start your deliberations.

Will you swear the marshals.

(Marshals duly sworn.)

(The jury retired to commence its deliberations at 12:35 p.m.)

THE COURT: I will see counsel in the robing room.

(In the robing room.)

THE COURT: I am going to have to go uptown this afternoon around 2:30. I can excuse the jury at that time, but they are not going to be doing much deliberation. I don't know when I will be back. I might be back by 4:30 or 5, unless you want to work it if they want the testimony read or exhibits. Exhibits

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don't present much of a problem, but they might have some questions. Or I could adjourn until tomorrow, but I would like to have them continue.

MR. TOPKIS: Maybe they can go through without any questions.

THE COURT: I think Juror No. 2 might have some. I am sorry I got involved in a problem.

MR. TOPKIS: For that matter, with your Honor's permission, if it should happen they wanted testimony to be read to them possibly we could work our between ourselves a procedure to do that.

THE COURT: If you have any question at all about it you can get hold of Judge Edelstein to come down.

MR. TOPKIS: Sure, but would it be all right with your Honor, if we could agree what portion of the testimony they wanted read, if we read it to them? I am sure we are all good enough friends to work that out, or at least I would hope so.

THE COURT: Okay. I will probably get back, or I'll call. I will leave at 2:30.

MR. TOPKIS: Your Honor will be submitting to them shortly the counterclaim.

THE COURT: Yes, I would like to get some

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suggestion on what we should charge so far as the counterclaim is concerned. Maybe we can get agreement on the issue of damages.

MR. TOPKIS: I think your Honor has already --

THE COURT: I didn't go into the matter of what the amounts owing were with respect to the three defendants. All I would charge is that they could consider that as an element of the damages.

MR. TOPKIS: That is all right with us. Is that all right with you?

MR. BRENNER: Yes.

MR. TOPKIS: Why not do just that and be done.

THE COURT: All right. I will call them in before I go and give them that instruction

Be back by [illegible]

(2:10 p.m.)

(In open court; jury present.)

THE COURT: You will recall that when I speaking to you about the defendants' counterclaim I said there had been a stipulation as to the amount of damages which any one or all of the defendants could be entitled to recover in the event that the defendant proved his claim for fraud and deceit.

I was mistaken on that point. The parties have not agreed as to the amount of damages. They have agreed that the balance owing by Textura to Burlington is $16,156.60, that the balance owing by Textura to Clark-Schwebel is $36,740.82, and the balance owing by Textura to J. P. Stevens is $17,156.60.

That stipulation is a part of the evidence, and you may, if you reach the issue of damages on defendants' counterclaims, consider those stipulated amounts as an element of damages. However, it is up to you, should you reach the issue of damages, to specify what amount of damages should be awarded.

With that in mind, I have prepared a new fourth page to the questionnaire which will now be given to you, and this I hope will be some clarification.

Very well, you can resume your deliberations.

(The jury retired to resume its deliberations at 2:15 p.m.)

(In open court; jury not present.)

MR. TOPKIS: Your Honor, I think we had a note from the jury. Does your Honor want to consider that now?

THE COURT: Yes, if you can let me see it.

(Pause.)

THE COURT: I have already seen that. I take it the first represents the invoices of the three defendants. The other is Mr. Schwebel's testimony for the period from 1962 to 1966.

MR. BURGESS: I think it's a representative invoice from those years, and I don't know what '62 to '66 refers to.

THE COURT: That's right.

Very well, we will get the jury back in and see what testimony they want. If they want his entire testimony, I guess it can be done, but I think they may have some particular matter in mind.

Why don't we get them back.

(Jury present.)

THE COURT: I am sorry. I didn't

realize there was a note. I take it the first is that you want to have representative invoices of the three defendants, is that correct, for the period 1962 to 1966, and then the other is Mr. Schwebel's testimony.

Is there any particular portion or subject matter that you are interested in, or do you want the entire testimony read? I think it is important when you are really interested in a particular part of the testimony if you could specify that. Otherwise, all of the testimony will be read.

Is there any particular testimony?

THE FOREMAN: There was one particular part in the testimony that necessitated the need for it, and that was Mr. Schwebel's background, when he sold his company. I believe that was testified.

JUROR NO. 2: There is some dispute among us as to Mr. Schwebel's transformation when he started business, how he went into forming the Clark-Schwebel business. We were not sure about that part.

THE COURT: Just about his background then?

JUROR NO. 2: Yes.

THE COURT: Very well. I am sure counsel can agree among themselves what that portion of testimony

will be.

You can resume your deliberations and when we have found that testimony it will be read.

THE FOREMAN: In the future, your Honor, if we need the testimony does it necessarily mean we have to be specific? Because we had a list of most of it.

THE COURT: No. Very frequently it happens that the jury will ask to have some testimony read which may occupy a whole day, and if you have to read all that testimony because there is just one question in your mind, there is a lot of time that could be wasted. So that if there is a particular item that you are interested in, and you can identify it, that will help. That is not necessary. You are at liberty to have the whole testimony read.

I will say, however, that where you have a question in your mind and the testimony is read and you come to that point where what you are puzzled about, the question that you have, is answered or you get some help from the testimony and you feel that that's what you were you were looking for, why, you can indicate that.

There may be other testimony relating to

that which should be read, and counsel will have to work that out among themselves, but I would suggest that if you ask that all of a witness' testimony be read, that when you are satisfied that you have heard enough you indicate, and then let counsel take off from there.

JUROR NO. 2: Let me understand. You mean if we request somebody's testimony, it is read to us, we don't have access to that in our jury room? Is that the way the procedure is?

THE COURT: You have the testimony read to you here. You don't take the testimony in with you.

JUROR NO. 2: We weren't aware of that.

THE FOREMAN: We didn't know that.

MR. TOPKIS: If your Honor please, Mr. Schwebel's background is set forth, in setting up Clark-Schwebel is set forth, in the first few pages of his direct testimony. We will have no objection to those pages being read to the jury at this time so they don't have to shuttle back and forth.

THE COURT: All right.

MR. TOPKIS: Does your Honor want Mr. Deutsch to read it, or I will, or Mr. Burgess? I don't care.

THE COURT: We can have the reporter read it.

(By stipulation of counsel the following exhibits were handed to the jury: Defendants' Exhibit AS, Plaintiffs' Exhibit 807, Plaintiffs' Exhibit 814.)

(The testimony of Jack P. Schwebel was read from page 382, line 8, to page 383, line 8, at which point the jury indicated they had heard the desired portion of the testimony.)

(Court's Exhibit 2 marked.)

(6:00 p.m.)

(In open court; jury present.)

THE COURT: Ladies and gentlemen, it's been a very long day for you, and the hour is now 6, and I think it is time for you to have some surcease and to be permitted to go home.

Accordingly, I am going to excuse you now, with the understanding that you retunr tomorrow morning. You are not being discharged, and I want you to understand that when I ask you to return tomorrow morning to continue your deliberations that that is an order of the court, and putting it in a more refined perspective an order of the court is such that if you

don't comply with that order you are inviting serious sanctions.

I understand that one of your members failed to show up today. That sort of thing just isn't done, and I don't expect that it will be done here, but I just want you to know by way of precaution that I will not countenance your failure to return tomorrow morning.

Now, I haven't set a time because I want to chat with you about it, and I would like you to be brought back at a time that is convenient, and I am prepared to hear your suggestion.

Would you like to come here at 10 o'clock or 9:30 or what?

JUROR NO. 3: I prefer 10.

THE FOREMAN: Ten o'clock.

THE COURT: Do you all live in the vicinity?

THE FOREMAN: I do.

THE COURT: You will all be here tomorrow morning at 10 o'clock, will you?

THE FOREMAN: Yes.

THE COURT: I will be available all day, and to use a colloquial expression, I am pinch hitting

for Judge Tenney. I am not substituting for him because nobody can do that, nor am I replacing him, because nobody can do that, but I am pinch hitting for him, so I shall see you tomorrow and expect you to continue your deliberations, and I sincerely hope that you will be able to arrive at a verdict by tomorrow evening, at least.

Anything further, gentlemen?

MR. BURGESS: No, your Honor.

MR. TOPKIS: No.

THE COURT: You are excused. And one more admonition I don't think that is necessary, but again by way of precaution, you are not discuss this case with anyone, and anyone means precisely that, neither your relatives, your wife, your husband, your friend, or anybody, including yourself, until you return to continue your deliberations tomorrow when you return to continue discussions among yourselves.

Good evening.

(Adjourned to November 13, 1974, at 10:00 a.m.)

CARLYLE MICHELMAN, Trustee of Textura, Ltd., in Bankruptcy Proceedings, et al.

vs. 66 Civ. 4230

CLARK-SCHWEBEL FIBER GLASS CORPORATION, et al.

New York, November 13, 1974
10 a.m.

(Jury deliberations resumed at 10:00 a.m., and the following action was taken pursuant to notes received from the jury:)

Note requesting representative invoices of three defendants period 1962-1966.

By consent of the parties, Plaintiff's Exhibits 807, 814 and Defendant's Exhibit AS was sent into the jury room.

Note requesting reading of J. Schwebel's testimony.

Testimony read as requested.

Note requesting information regarding formation and officers of Soft Flex.

By consent of the parties, the formation date was 1-11-67, and the officers were Erskine, Cahn and Gumbiner.

Note asking who did Cahn work for prior to

forming Softflex?

By consent of the parties, the jury was informed he worked for Owens-Corning.

Note from jury asking: Can two officers of same firm make a conspiracy?

By consent of the parties, the answer sent back to the jury was "No."

By consent of the parties, in response to a jury request, the following exhibits were sent into the jury room: A, B, C, D, E, F, H, I, J, K, Y, Z, AK, AL and AJ of Defendants; 131. 146, 500, 824, 831, 843, 860, 870, and 871 of Plaintiffs.

At the request of the jury, the cross, redirect and recross examination of the Witness Nordheim was read, after which the jury sent in the following note:

"Can we have again the testimony of Mr. Nordheim prior to him saying and including statement 'What would you do if you were in trouble.'

"Direct testimony of Mr. Burgess."

The direct examination of witness Nordheim was then read to the jury.

(Time noted: 5:30 p.m. Jury present in open court; Chief Judge Edelstein presiding.)

THE COURT: I am sure you are tried now and would

like to go home, so we will giveyou leave to do that. We hope you enjoy your dinner, and I look forward to seeing you again tomorrow. If ten o'clock is a convenient time, we will fix that.

JUROR NO. 2: Sir -- I'm sorry, I thought you were finished.

THE COURT: That's all right. I am accustomed to being interrupted.

JUROR NO. 2: If I say something out of order stop me quickly, okay? I think we are very --

Before you do that, let me hear what you have to say privately.

(Jurors 1 and 2 approached the bench, and the following proceedings were had:)

THE COURT: If you are going to tell me about the possibility of a verdict, don't tell me anything about the verdict, don't tell me how you are divided, if you are divided. Do you understand?

JUROR NO. 2: I am well aware of that.

There is one issue that is separating us that if we resolve this one issue we can start really rolling, and that one issue we have been talking about all the time, we are not positive in our mind what a conspiracy is. We want it spelled out for us.

THE COURT: All right.

JUROR NO. 1: But also I might like to have it tomorrow morning. Do you want to do it now?

THE COURT: Wait. Just relax for a moment.

If I understand you, you want a definition of a conspiracy and what constitutes a conspiracy; is that right? Isn't that what you are asking me?

JUROR NO. 2: I will say yes now.

THE COURT: In other words, nobody can tell you to find yes or no. I can give you a definition of it. Now, is that what you are asking me now?

JUROR NO. 2: Sir, if I can ask a question --

THE COURT: All right, would you tomorrow morning write it out, write it out, put it in a sealed envelope, and send it to me.

JUROR NO. 2: Okay.

THE COURT: Then we will have no problems whatsoever.

JUROR NO. 2: Okay. That's great.

(In open court:)

THE COURT: The transcript is available to you; the side bar conference was not to keep any information from you but to take the precaution of perhaps keeping a statement away from the jury which they should not be

not the Court, and, therefore, the Court may not answer your question, "Is this a conspiracy either with a yes or no answer. But the Court can say that this evidence does not necessarily lead to the inference that it is a conspiracy or that it is not a conspiracy. I emphasize, however, that this is evidence you may consider in conjunction with all the other evidence and all the instructions.

MR. BREINDEL: Plaintiffs have no objection to that.

MR. TOPKIS: Nor do the defendants.

THE COURT: Now, on the question:

"Please explain to us what is circumstantial evidence?"

I am going to use my own instructions on circumstantial evidence, not because I think it is clearer or more meaningful than Judge Tenney's, but the only reason for the change is that I am more comfortable in its use and so, like something that you dealt with yourself, you prefer to use that.

If you would like me to give you my instructions on circumstantial evidence, I will be glad to do that. I use a short form occasionally, and at other times a somewhat longer form:

In defining circumstantial evidence, I should advise you that all evidence may be of two types, direct and circumstantial. Evidence is direct when the facts are shown by an exhibit which has been admitted in evidence or when it is sworn to by the testimony of a witness who has actual knowledge of the facts, which he derived by the use of one of his five senses; it is something he saw, something he heard said, or it is something that he did.

Circumstantial evidence simply means the drawing of a logical conclusion or inference from other facts that have been seen or heard.

You are all familiar with this process of drawing logical conclusions from other facts. The process is no different here -- conclusions that your common sense tells you must be so. No greater degree of certainty is required when evidence is circumstantial than when it is direct, for in either case you must be convinced by a preponderance of the evidence before you can find any defendant liable here.

MR. BREINDEL: That is fine.

MR. TOPKIS: Yes.

Your Honor, we have already delivered the invoices to the jury.

THE COURT: What about the Nordheim direct

examination?

MR. BREINDEL: We have worked it out with the reporter. In the past we have read it without the Court being present. So I don't think we have to detain you with that.

THE COURT: I am going to see if I can keep them in here for lunch. It is an awful waste of time to send them out.

(Proceedings continued in the courtroom with the jury in the box.)

THE COURT: Good morning, ladies and gentlemen. This is the first chance I have had to see you and say hello to you.

I have your questions, and I am sorry that I could not come down immediately. Unfortunately, as you are well aware, this is a busy court, and sometimes a judge has more than one task to do; he just can't drop everything momentarily and go about something else. I am sure you understand and I trust you will forgive me for this delay.

I would like to read your questions so that they are permanently inscribed in the record, and also to be sure that I have read the questions as you have stated them.

Your first question is as follows:

"Company X is telephoned by company Y and tells company X he (company Y) is holding up credit on customer A company. Y also tells company X that company Z is holding up credit on customer A. And actions followed that two out of the three companies at the same time period, modified their credit arrangement.

"Is this a conspiracy?"

Is that correct? Is that the question you have asked?

THE FOREMAN: Yes.

THE COURT: Then your next question:

"2. Please explain to us what is circumstantial evidence?"

That is your question?

THE FOREMAN: Yes.

THE COURT: "3. Are there any invoices introduced into evidence? If so, we would like them. (Defendants to plaintiff.)"

It is my understanding that they have been furnished to you? Is that correct?

THE FOREMAN: Yes.

Now, the last is a request:

"Last five minutes of Nordheim's direct examination."

I am going to attempt to deal with your questions. But first I would like to make a brief statement to you. As you have probably discovered during your deliberations, not all questions can be answered with a yes or no answer and, indeed, many things in life can't be answered with a yes or no answer. And so I am going to attempt to give you some insights and some guidance in connection with the questions you have asked.

Regarding your first question, I would like to say to you that this is evidence which you may consider on the issue of conspiracy, keeping firmly in mind, however, the definition of conspiracy which has been given to you by the Court and the elements that must be found therein, together with all the instructions charged you.

What that means is you just can't take a piece of instruction, or a whole instruction and disregard all the other instructions. Nor, for that matter, should you take a piece of evidence and not consider all the evidence. You have asked me, "Is this a conspiracy?" That is a question for you to determine. You will recall that you were told that you are the finders of the facts, that that is your exclusive province and domain,

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to find the facts. That is the question you must answer. We, the Court, have tried to give you the guidelines, the criteria, the rules, the definitions which you can employ in reaching a decision. It may not answer your question, "Is this a conspiracy?" either with a yes or a no answer, but I must point out to you that this evidence does not necessarily lead to the conclusion that this is a conspiracy, nor does it necessarily lead to the conclusion that it is not a conspiracy.

At this point I must emphasize that you may consider the evidence that you have set forth in your statement, but you must consider that evidence, if you do, in conjunction with all the other evidence and the instructions that have been given to you.

Is that clear?

Now, you want to know what circumstantial evidence is, and, really, there is no mystery about that. As a matter of fact, in your own daily lives you very often deal with decisions in making up your minds by circumstantial evidence.

In defining circumstantial evidence, I point out to you that there are two types of evidence, direct and circumstantial. Evidence is direct when the facts are shown by an exhibit which has been admitted in evi-

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dence, and, as an example, the invoices that you have asked for, which have been given to you. Or when it is sworn to by the testimony of a witness on the stand who has actual knowledge of the facts which he derived by use of his five senses. It is something he saw; it is something he heard said; or it is something that he did.

Circumstantial evidence simply means the drawing of a logical conclusion or inference from other facts that have been seen or heard.

You are all familiar with the process of drawing a logical conclusion from other facts. The process is no different here, conclusions that your common sense tells you must be so because, like a long view telescope, where the picture comes out in parts, but it is all interrelated, it moves smoothly. And you must remember, too, that no greater degree of certainty is required when evidence is circumstantial, than when it is direct, for in either case, direct or circumstantial, you must be convinced by a preponderance of the evidence before you can find any defendant liable.

Now, that is all there is to circumstantial evidence. Maybe you never thought about it. But now that you have been given some definition of circumstantial evidence, can you remember how often in your daily life

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ms9

again and again and again you deal with circumstantial evidence? Because all your decisions are not based on what you saw, what you smelled, what you heard. So you do know what circumstantial evidence is.

Your third question has already been dealt with.

Now, that leaves your request for the last five minutes of Nordheim's direct examination. I don't quite know what you mean by five minutes. I am eager to conform and comply with your request. I found it a little difficult using my own watch to determine --

JUROR NO. 2: We may only want to hear the last minute.

THE COURT: The reporter has been instructed to start to read you Nordheim's direct examination, and as soon as we have reached the point where you feel that your request has been satisfied, raise your hand. And I will understand that that means you now have the information you want.

(The reporter read from the direct examination of the witness Nordheim.)

THE COURT: I hope this helps you in your deliberations and makes it possible for you to deal with the questions that you have on hand.

Do you want to go out for lunch now or do you

when I recall that you said to me you would like the request to be acted upon tomorrow.

JUROR NO. 1: Yes.

THE COURT: I have also been informed that you are somewhat tired and weary tonight, and you would like to be sent home. That is understandable, and I will bid you good evening, and I hope you have a good night's rest, and that you come in tomorrow refreshed and invigorated and begin to resume your deliberations, and perhaps I may have something more to say about that tomorrow.

Now, this is the second day, and although I must tell you I am pleased to get to know you better, but tomorrow I really want you to dig in here, and, as I say, I will have more to say about that tomorrow. I don't want to take up any more time tonight.

You are excused.

(Jury excused at 6:10 p.m.)

THE COURT: Their note will be marked for identification. It reads as follows: "Please read the Judge's charge to the jury on the conspiracy law excluding instructions on damages."

(Court Exhibit No. 9 was marked.)

THE COURT: Good evening, gentlemen.

(Adjourned to November 15, 1974, at 10 a.m.)

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CARLYLE MICHELMAN, Trustee of Textura, Ltd., in Bankruptcy Proceedings, et al.

vs. 66 Civ. 4230

CLARK-SCHWEBEL FIBER GLASS CORPORATION, et al.

New York, November 15, 1974; 10.00 o'clock a. m.

(Hon. David N. Edelstein, presiding.)

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(The jury continued its deliberations at 10.00 o'clock a.m.)

(At 1.25 p.m. the following took place in the robing room.)

MR. TOPKIS: Your Honor, we asked for an opportunity to see you, because after thinking about it overnight, it is the joint view of counsel for the three defendants that we would respectfully move that the Court at this point declare a mistrial.

The reasons for it are that the jury has three times now evidenced its puzzlement over the meaning of the conspiracy charge in this case. I am not sure your Honor is familiar with all three occasions, because the first of them occurred outside of the presence of your Honor. The

ms2

jury sent in a note while Judge Tenney was gone and your Honor wasn't here inquiring can two officers of one corporation conspire.

By agreement of counsel for both sides that note was endorsed "No" and returned to them.

But that question, it seems to me, evidenced rather extraordinary failure on the part of the jury to understand what conspiracy is. Then they sent in this note your Honor saw yesterday, "What is a conspiracy?"

Your Honor, of course, instructed them on that issue. But the note itself, it seems to us, evidences a lack of comprehension, basic comprehension.

And, finally, last night effective this morning the jury has requested a repetition of the conspiracy charge, and we had, I might mention also, yesterday the fact that the jury evidenced its puzzlement as to the meaning of circumstantial evidence.

Now, we have in this charge here two, I think, quite grievious errors, one of which Judge Tenney was candid enough to acknowledge after having delivered the charge, and I refer to the fact that he semed to rule or charge that the jury could find a conspiracy participated in by one defendant with some outsider, although there was no proof as to any outsider participating in any

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THE COURT: I understand your problem and I understand your argument. Yet I think it must be conceded based on your extensive experience -- I know your experience -- I'm not sure I know the experience of your colleagues on both sides -- that your making an assumption, the assumption being that this jury is puzzled and confused because they have come back on at least three occasions for answers to questions which you deem to mean suggest that they do not have a basic concept of conspiracy.

Now, you may be true in your assumption, but there is one thing lacking in this scenario, that at no time has this jury, even last night, when they suggested they were tired -- say to the Court, "We have debated these points; we are absolutely, irretrivably at odds; we cannot reconcile our differences; we ask that you release us because we cannot arrive at a verdict."

Now, isn't that curious? You're not going to suggest, I hope, that the jury is so lacking in fundamental intelligence that they are unable to say after three days, "We cannot reach an agreement." Or "We are so confused that it is impossible for us to resolve the issue."

Now, as to the other point that you make, I certainly can't deal with that or address myself to it,

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because what you are now asking me to do is to act as an Appellate Court to review Judge Tenney's instructions or Judge Tenney's rulings, because you say they are in error. Maybe they are. I don't know. But then there is another question.

Let's assume that he did commit error and let's assume that you do go up on appeal. The fact that error is committed does not necessarily mean that it is reversible error. I don't know. I know what your problem is. I am in a quandary, too, because I'm trying to acquite enough knowledge about the factual situation. We do know, however, that this case has lasted approximately three weeks: we do know that the issues are quite complex; we do know that there are numerous documents involved. This presents a maze to any jury. I am not even sure that if we all sat down, the six of us, and began to deliberate, that we would not have to wrestle with some of the problems that have arisen here.

All I am saying is, I just don't think it is timely for me to take a three and a half-week case now and just dump it.

MR. TOPKIS: Needless to say, I made the request with a keen awareness of your Honor's thoughts.

THE COURT: I am speaking to you as man to man.

ms6

I don't think I have yet the necessary foundation to make a record to support my discharging this jury.

There is another factor that perhaps you don't appreciate as much as I do, because it is not a problem for you. This jury is brought into the jury box here; they are told they have a public duty, and they do. They may say, "What is going on here? We have not indicated any disagreement; we have asked some questions; he has been impatient and irascible; he sends us home; he has dumped this case. There is a question of public relations. I would have to say something. I am discharging them? Why? "Because it appears from the questions that you have asked that you don't understand what this is about."

Do you want me to say that to them?

MR. TOPKIS: With regret, I would so suggest.

MR. BURGESS: Your Honor, would you like me to respond to the points that Mr. Topkis made?

THE COURT: Yes.

MR. BURGESS: The motion has taken me completely by surprise. I did not expect it. No indication was given of it to me this morning.

THE COURT: The reason I went on, I thought you had agreed to this.

ms7

MR. TOPKIS: No, I am sorry. I was speaking only for defense counsel.

THE COURT: You said "my colleagues". I consider everybody a colleague, including those on the other side of the aisle.

Is this your motion?

MR. BURGESS: Hardly. We were given no notice they were moving for a mistrial. This is the first notice.

First of all, there have been, I guess, three requests for a repeat of certain instructions.

THE COURT: (To the clerk) Would you tell the jury not to be impatient, that, unfortunately, being the Chief Judge involves problems occasionally, and to bear with me.

MR. BURGESS: I would suggest the first request for a clarification may have been suggested by some testimony that I elicited during the trial.

The second seemed to me to indicate, contrary to what Mr. Topkis suggests, rather a great understanding of the conspiracy problem, than a lesser understanding of it, and shows that the jury is quite astute in getting to the issues of this case.

I suggest Mr. Topkis' discomfort is based on that

msll

conspiracy. I don't know it as well as you do, but I know what it is about. What I am trying to get at that I think is important, can I get enough cooperation from all of you to draft an instruction that may give them some stronger light on the road they are to travel? Can we do that?

MR. BREINDEL: We will try.

THE COURT: Off the record.

(Discussion off the record.)

THE COURT: The request is:

"Please read the Judge's charge to the jury on the conspiracy law, excluding instructions on damages."

I propose to do precisely that. I am not going into the facts. I will not attempt to marshal the facts in connection with the conspiracy. I am going to give them a general charge, one taken out of the pattern of instructions for antitrust conspiracy cases, with very few editorial modifications.

MR. HARDISON: May we have a chance to see that in advance?

THE COURT: I will read it to you:

A conspiracy is a combination of two or more persons, by concerted action to accomplish some unlawful

spiracy; nor that all means or methods which were agreed upon were actually used or put into operation; nor that all persons alleged to have been members of the claimed conspiracy were such. What a preponderance of the evidence in the case must show is that the alleged conspiracy was formed; and that one or more of the means or methods described in he complaint was agreed upon to be used in an effort to effect or accomplish some object or purpose of the conspiracy alleged in the plaintiff's complaint, and that two or more persons, including one or more of the defendants, were knowingly members of the conspiracy alleged in the complaint.

Knowledge that an illegal conspiracy is in existence and that others must be involved is sufficient, and it is not necessary to find that each member has knowledge of the full scope of the conspiracy.

MR. HARDISON: Your Honor, plaintiffs are relying on parallel conduct, and I don't believe that that is covered.

THE COURT: It may be. It is a general definition of conspiracy. That is all the jury has asked me to give, and that is all I propose to give.

MR. BREINDEL: Plaintiffs have no objection to your Honor's charge.

ms14

MR. TOPKIS: Just to make our record very plain, we adhere to the positions we have previously expressed, and to the degree that this proposed charge that your Honor will give does not remedy those problems we take exception to it.

THE COURT: I have another option. I can read them Judge Tenney's charge on conspiracy. I have had all the portions of his charge on conspiracy clipped and pasted together.

MR. HARDISON: Would you consider looking at the conspiracy instructions the defendants proposed?

THE COURT: No, I consider the pattern instructions contained in the Pattern Instruction book adequate.

MR. BREINDEL: Plaintiffs are amenable to your charge or to Judge Tenney's charge.

MR. HARDISON: Your Honor, may I except to your refusal?

THE COURT: Even if you don't put it on the record, I will consider everything that I say or do is excepted to. That solves your problem.

MR. HARDISON: Yes.

(At 1.45 p.m. proceedings continued in the courtroom with the jury in the box.)

ms15

THE COURT: Good morning, ladies and gentlemen. I apologize for the delay. But as you probably are aware, there are many details in the course and conduct of a trial that do not concern the jury, that require discussion, and this morning the lawyers in this case and I had to deal with certain matters that are not before you, and so we had to keep you waiting.

I read your note for the record:

"Please read the Judge's charge to the jury on the conspiracy law, excluding instructions on damages."

It is signed "Philip Navarrete."

I read this to mean that you would like a definition on conspiracy? Is that correct?

THE FOREMAN: That is correct.

THE COURT: I have tried to prepare one that is not too lengthy, and I hope that this will give you some help.

As you recall, Judge Tenney in his charge on conspiracy went on at fairly great length. I am sure you remember most of those instructions. What I am going to attempt to do now is to give you a more or less general view of the meaning of conspiracy, and I hope that helps you. So please listen to me carefully.

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A conspiracy is a combination of two or more persons, by concerted action to accomplish some unlawful purpose, or to accomplish some lawful purpose by unlawful means. So, a conspiracy is a kind of partnership, in which each member becomes the agent of every other member. The essence of a conspiracy is a combination or agreement to violate or to disregard the law.

Mere similarity of conduct among various persons, and the fact that they may have associated with each other, and may have assembled together and discussed common aims and interests, does not necessarily establish proof of the existence of a conspiracy.

However, the evidence in the case need not show that the members entered into any express or formal agreement, or that they directly, by words spoken or in writing, stated between themselves what their object or purpose was to be, or the details thereof, or the means by which the object or prupose was to be accomplished. What a preponderance of the the evidence in the case must show, in order to establish proof that a conspiracy existed, is that the members in some way or manner, or through some contrivance, positively or tacitly -- "tacitly," meaning unspoken -- came to a mutual understanding to try to accomplish a common and unlawful plan.

ms16

The evidence in the case need not show that all the means or methods set forth in the plaintiff's complaint were agreed upon to carry out the alleged conspiracy; nor that all means or methods which were agreed upon were actually used to put into operation; nor that all persons alleged to have been members of the claimed conspiracy were such. What a preponderance of the evidence in the case must show is that the alleged conspiracy was formed; and that one or more of the means or methods described in the complaint was agreed upon to be used in an effort to effect or accomplish some object or purpose of the conspiracy alleged in the plaintiff's complaint, and that two or more persons, including one or more of the defendants, were knowingly members of the conspiracy alleged in the complaint.

Knowledge that an illegal conspiracy is in existence and that others must be involved is sufficient, and it is not necessary to find that each member has knowledge of the full scope of the conspiracy.

I don't think I can state the general definition of conspiracy any simpler than that.

Are you now ready to retire to deliberate further? You have been at it for almost three days, and I assume that you have sufficient comprehension to have

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grasped all the facts that have been introduced in evidence, all the documents, the charge given to you by Judge Tenney, the few instructions that I have given you. I suggest that you return and really bear down now. Will you do that?

THE FOREMAN: Yes.

(The jury retired at 1.51 p.m. to continue its deliberations.)

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CARLYLE MICHELMAN, Trustee of Textura, Ltd., in Bankruptcy Proceedings, et al.

vs. 66 Civ. 4230

CLARK-SCHWEBEL FIBER GLASS CORPORATION, et al.

New York, November 18, 1974;
10.00 o'clock a. m.

(Hon. David N. Edelstein, presiding.)

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(The jury continued its deliberations at 10.00 o'clock a.m.)

(The following took place at 11.20 a.m. in the robing room.)

THE COURT: You are aware of the contents of the last note the jury sent out, are you not?

MR. TOPKIS: Yes.

THE COURT: I understand the exhibits have been given to them pursuant to your agreement.

We certainly know that they are not entitled to the last half hour of Mr. Burgess' summation, or anyone else's, for that matter.

Now we come to the second question:

"All charges to the jury from the Judge having to do with the question of damages."

ms6

given to them, rather than it being read.

THE COURT: I will tell them then what I propose to do, and if they object I will read it. I think that is the sound view.

(Proceedings continued in the courtroom with the jury in the box.)

THE COURT: How are you this morning, ladies and gentlemen?

THE FOREMAN: Very good.

THE COURT: Your note reads as follows;

"1. Approximately last half hour of Mr. Burgess' summation."

I regret that I cannot comply with that request. It is not customary or traditional, or, for that matter, desirable. As a matter of fact, this is the first time in 25 years I have had that sort of a request.

As was probably explained to you, summation is argument; it is not evidence. Lawyers in their summation give you their arguments; they are not testifying; they are not under oath; they weren't there; they didn't see the events; it is merely their attempt to put the case in some perspective for you.

"All charges to the jury from the Judge having to do with damages."

(Instructions given to the jury marked Court's Exhibit 12.)

(Jury retired to the jury room at 11.35 a.m. to continue its deliberations.)

(The jury was taken to lunch at 12 noon and returned at 1.15 p.m. to continue its deliberations.)

(At 2.55 p.m. The jury took its place in the jury box)

THE CLERK: Members of the jury, listen to your verdict:

"A. Conspiring to drive plaintiffs out of business.

"1. Was there a conspiracy between two or more persons or corporations to drive Textura out of business by any or all of the following means:

" - by withdrawing, restricting or reducing the credit terms previously extended to Textura

"- by lowering the quality of the merchandise that any defendant or defendants had previously sold to Textura.

"- by ceasing to deliver any fabric

"- by refusing to weave any fabric

"- by refusing to sell any fabric

"- by modifying any arrangement under which the goods woven for Textura were held and not invoiced until called for delivery

"- by coercing or forcing Textura to enter

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into a settlement agreement in connection with disputes it had with Clark-Schwebel, or

" - by modifying policy regarding the adjustment of quality claims."

Your answer is "Yes."

"2. If your answer to question 1 is Yes, which of the defendants was involved in the conspiracy? Answer yes or no for each defendant.

"Burlington?"

Your answer is, "Yes."

"Clark-Schwebel?"

Your answer is, "Yes."

"J. P. Stevens?"

Your answer is, "No."

"3. Was the conspiracy a proximate cause for Textura going out of business?"

Your answer is, "Yes."

"4. If your answer to question 1 is Yes and your answer to question 3 is Yes, what damages, if any, did Textura sustain as a result of the conspiracy? Give a dollar amount or 'none.'"

Your answer is $531,617.

"5. If your answer to question 1 is Yes, did plaintiff Powrie sustain any damages as a result of

the conspiracy which he could not have avoided by using reasonable efforts?"

Your answer is, "No."

"6. If your answer to question 5 is Yes, what unavoidable damages, if any, did Powrie sustain? Give a dollar amount or 'none'."

Your answer is none.

"B. Conspiring to fix prices on industrial fiberglass fabrics.

"1. It has been stipulated that between 1956 and late 1962 the defendants fixed prices on first-grade ('firsts') industrial fiber glass fabrics. On June 27, 1960, Glass Fabrics purchased $448.06 worth of industrial fabric 'firsts' from J. P. Stevens, and on July 15, 1965 and August 25, 1965, Textura purchased a total of $1,543.27 worth of industrial fabric 'firsts' from Burlington.

"Had the prices of these particular industrial fabrics been fixed? Answer yes or no for each of the following:

"(a) Industrial fabric purchased by Glass Fabrics from J. P. Stevens on June 27, 1960."

And your answer is, "Yes."

"(b) Industrial fabric purchased by Textura

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from Burlington on July 15, 1965 and August 25, 1965."

Your answer is, "Yes."

"2. If your answer to either (a) or (b) of question 1 of this Part is Yes, what damages were sustained as a result of the price-fixing on the particular fabric purchased? Give a dollar amount or 'none' for each of the following:

"(a) Damages sustained by Glass Fabrics on purchase of industrial fabric from J. P. Stevens on June 27, 1960."

Your answer is, $22.40.

"(b) Damages sustained by Textura on purchase of industrial fabric from Burlington on July 15, 1965 and August 25, 1965."

Your answer is, $77.16.

"C. Counterclaims.

"1. Has any plaintiff or Grafstrom intentionally made a false representation of any material fact to any defendant which was relied upon by that defendant?"

Your answer is, "No."

(The jury was polled by the clerk.)

THE COURT: The Court wishes to discharge you

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with its thanks. Your services are no longer required. I would like to express my deep appreciation to each and all of you. I think you have been diligent, conscientious, and made every effort to bring about a ju t verdict. I hope that you have derived some satisfaction and gratification in this public service. Many don't. They think it is onerous and inconvenient, and a demand upon their time which they do not wish to make. I hope that you have not found that so, that you would wish to serve again in the future.

Thank you very much.

(Jury discharged.)

THE COURT: Is there any further business?

MR. TOPKIS: Your Honor, we had previously moved before Judge Tenney for a directed verdict, as well as other motions, and Judge Tenney had reserved decision on those motions. The defendants would like to renew those motions and the motions for a judgment NOV and for a new trial.

I know we have 10 days, but considering the length of the record and the number of exhibits, I am sure you will give us an extension of that time.

As to the matter of these motions, is that a matter which your Honor wou. wish us to present to Judge

Tenney or to yourself?

THE COURT: I would prefer that you present this matter to Judge Tenney, and I would also indicate that if for any reason Judge Tenney is not in position to deal with these motions, then I would undertake to do that. But in the present instance I suggest you make your motions to Judge Tenney.